Supreme Court, U.S.
FILED

No. 03129 8 MAR 1 0 2004

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In The

Supreme Court of the United States

MARGARET WILLIAMS,

Petitioner,

v.

DEVELL R. YOUNG, M.D., P.C. and
DEVELL R. YOUNG, M.D.,

Respondents.

On Petition For Writ Of Certiorari
To The Georgia Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether Official Code of Georgia Annotated § 9-3-71 (a), dealing with medical malpractice statutes of limitation, is unconstitutional as a denial of equal protection and due process guaranteed to petitioner Margaret Williams pursuant to the Fifth and Fourteenth Amendments to the Constitution of the United States and Art. I, Sec. I, ¶¶ 1 & 2 of the Constitution of the State of Georgia.

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STATUTE

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OPINIONS BELOW

The order of the Georgia Supreme Court, dated November 26, 2003, vacating a previously granted writ of certiorari, Case No. S03G0606, was not published but is attached hereto in the Appendix. (37a). The denial of the motion for reconsideration of the vacation of the grant of certiorari in this case was dated December 11, 2003, and was also not reported. (38a). The Supreme Court of Georgia's grant of the writ of certiorari is dated May 5, 2003. (34a). The Georgia Court of Appeals decision for which the writ of certiorari was granted is reported at 258 Ga. App. 821. (27a).

The Georgia Supreme Court opinion which had previously remanded this case to the Georgia Court of Appeals, is reported at 274 Ga. 845. (20a).

The opinion of the Court of Appeals, reversing the trial court's grant of summary judgment to respondents, is reported at 247 Ga. App. 337. (4a).

The order of the trial court granting respondents' motion for summary judgment from which the appellate course of this case has run, is dated November 23, 1999 by Chief Judge Loring A. Gray, Jr. of the Daugherty County Superior Court. That order is set forth in the appendix. (1a).

JURISDICTION

This petition for a writ of certiorari is filed within 90 days of the date of the Supreme Court of Georgia's denial of the motion for reconsideration herein. Jurisdiction is

invoked and conferred by 28 U.S.C. §§ 1257, 2101(c) and 2104.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

1. U.S. Const. Amendment V:

No person shall be deprived of life, liberty, or property, without due process of law; . . .

2. U.S. Const. Amendment XIV, § 1:

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Ga. Const. Art. 1, § 1, ¶ 1:

No person shall be deprived of life, liberty, or property except by due process of law.

4. Ga. Const. Art. 1, § 1, ¶ 2:

Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws.

5. Official Code of Georgia Annotated § 9-3-71(a):

Except as otherwise provided in this article, an action for medical malpractice shall be brought within two years after the date on which an injury or death arising from a negligent or wrongful act or omission occurred.

STATEMENT OF CASE

This case arises out of a medical malpractice suit filed by Petitioner Margaret Williams against Respondents Dr. Devell Young and Devell R. Young, M.D., P.C.

Petitioner Williams began her treatment with Respondents Young on September 29, 1995. Petitioner Williams is and was diabetic, and she saw respondents for swelling and pain in her left foot and ankle on that initial visit. Petitioner Williams was treated with antibiotics and glucophage for diabetes and provided information for her diet.

Petitioner Williams continued to see Respondent Young for her pain and he prescribed medication, a lymph edema "foot pump" and blood tests, but at no time did respondents order or consider taking x-rays of Petitioner Williams' foot.

On September 30, 1996, Petitioner Williams made an office visit to respondents for her foot and leg pain and was told that she had a permanent condition she would have to live with and to return to his office in January of 1997. Between September 30, 1996 and November 4, 1996, Petitioner Williams conferred with respondents by phone. On November 4, 1996, Petitioner Williams had an appointment with Dr. Rhoads to get a second opinion. At that time Dr. Rhoads diagnosed her with dislocated bones in her foot. Petitioner Williams attempted on several occasions to call Respondents regarding this diagnosis of her condition, and finally spoke to Respondent Young regarding Dr. Rhoads' diagnosis. Respondent Young's response to the diagnosis was that "he didn't believe it," and Respondent Young also had told Petitioner Williams she was improving, which was inconsistent with the occurrence of

the broken or dislocated bones (referred to as Charcot's). Respondent Young also testified Petitioner Williams did not have the Charcot's while Respondent Young was treating her. Petitioner Williams continued to use Respondent Young for her diabetic management through December of 1996.

On October 28, 1998, Petitioner Williams filed her medical malpractice action against Respondents less than two years before the only time certain when Petitioner Williams' injuries related to the misdiagnosis of Respondent Young are known to have been present, which was on November 4, 1996 when Dr. Rhoads discovered the Charcot's or dislocated bones in Ms. William's foot. (The diagnosis of dislocated bones in the foot was later confirmed by surgery on December 10, 1996.) Petitioner's leg was ultimately amputated.

This case was decided on summary judgment on the statute of limitations issue. Inasmuch as Respondent Young, whose burden it is to establish that the case was not filed within the statute of limitations, and who cannot testify as to when, prior to November 4, 1996 the dislocation or Charcot's began, it could not have been established for purposes of summary judgment when the misdiagnosis occurred, when the conditions began, and, most importantly, given plaintiff's improvement prior to November 4, 1996, "the date symptoms attributable to the new injury are manifest to the plaintiff." *Walker v. Melton*, 227 Ga. App. 149, 151, 489 S.E.2d 63 (1997).

Respondents moved for summary judgment on the statute of limitations issue, which was granted in the trial court.

Petitioner Williams filed her notice of appeal to the Georgia Court of Appeals, which reversed the trial court's

decision based on the Georgia Court of Appeals' adoption of the "continuous treatment" doctrine.

Respondent Young then sought the writ of certiorari, which was issued by the Georgia Supreme Court, which then reversed the Court of Appeals and refused to adopt the "continuous treatment" doctrine. However, a three-justice concurrence further specified that "[u]pon remand, the Court of Appeals must, therefore, determine when the statute of limitations began to run on Ms. William's misdiagnosis claim and whether she filed her action within two years of that date." *Young v. Williams*, 274 Ga. App. 845, 848.

The Court of Appeals (*Williams v. Young*, 258 Ga. App. 821) then affirmed the trial court's order based on an incomplete and disputed factual recitation, and the Georgia Supreme Court once again granted the writ of certiorari, this time at the request of Petitioner Williams, concerning the following issue:

> In a medical malpractice action based upon the physician's alleged misdiagnosis of the patient's condition, what is 'the date on which an injury . . . occurred' for purposes of commencement of the two-year statute of limitations established by OCGA § 9-3-71(a)?

The Georgia Supreme Court then, in the shadow of the expiration of the second term of court in which this case pended, decided, over the dissents of two justices, that the writ of certiorari was improvidently granted and the writ was vacated.

A motion for reconsideration of that decision, addressing both the merits and the Georgia Supreme Court's inherent power to set the case over to a third term for

providential cause or otherwise, was denied. The case is now before this Court for consideration of this petition.

The constitutional issues were raised in the GTLA Amicus brief dated April 25, 2002, (52a) adopted by Petitioner. The Georgia Court of Appeals "decline[d] to overrule the misdiagnosis law, as the amicus curiae brief urges us to do." (30a).

REASON FOR GRANTING THE PETITION

1. OCGA § 9-3-71(a) is unconstitutional as a denial of equal protection and due process if it can be used to treat plaintiffs differently for purposes of the statute of limitations depending on different standards applied to misdiagnosis cases.

The Georgia Supreme Court in its second grant of certiorari in this case asked: "[i]n a medical malpractice action based upon the physician's alleged misdiagnosis of the patient's condition, what is 'the date on which an injury . . . occurred' for purposes of commencement of the two-year statute of limitations established by OCGA § 9-3-71(a)?" The Court of Appeals in *Williams v. Young*, 247 Ga. App. 337, 339 (Williams I) divides misdiagnosis lawsuits into two classes – one in which the symptoms exist before the misdiagnosis, where the misdiagnosis itself is the injury and not the subsequent discovery of the proper diagnosis; and those in which a misdiagnosis results in subsequent injury that is difficult or impossible to date precisely, where the statute of limitation runs from the date the symptoms attributable to the new injury are manifest to the plaintiff.

As the Georgia Court of Appeals stated in *Walker v. Melton*, 227 Ga. App. 149, 151: "[w]hen a misdiagnosis

results in subsequent injury that is difficult or impossible to date precisely, the statute of limitation runs from the date symptoms attributable to the new injury are manifest to the plaintiff." *See also Whitaker v. Zirkle*, 188 Ga. App. 706, 708 (1), 373 S.E.2d 106 (1998): "[w]hen an injury occurs subsequent to the date of medical treatment, the statute of limitation commences from the date the injury is discovered." In *Walker* the evidence showed that injuries occurred between July 1992 and January 1994, but did not show the precise date when they occurred. As in *Walker*, it is unclear when the bones dislocated and apparently remain in dispute by Respondent Young in any event. It also remains in dispute whether Petitioner Williams' condition was permanent or improving.

Under neither misdiagnosis theory were Respondents entitled to summary judgment. As set forth in the GTLA amicus brief,

> [t]he rule that 'the misdiagnosis itself is the injury' ignores the consequences of the physician's negligence on the patient – the aggravation of the original condition as a result of the erroneous treatment or no treatment based on the misdiagnosis. It is in contravention of OCGA § 9-3-71(a), which, as the [Georgia] Supreme Court has stated, 'begins with the occurrence of an injury, not performance of a negligent act,' and it improperly focuses on the adverse consequences of the allegedly negligent acts without regard to when the negligent act occurred. *Young v. Williams*, [274 Ga. at 847, 848, (2002).] Further, as [the Court of Appeals] has recognized, application of this rule has the potential to impermissibly cut off the patient's cause of action before the 'new injury' is ascertainable. *Stone v. Radiology Services, P.A.*, 206 Ga. App. 851, 854, 426 S.E.2d

663-(1992); *Hughley v. Frazier*, 254 Ga. App. 544, 562 S.E.2d 82 (2002) (physical precedent); *Williams v. Young*, 247 Ga. App. at 339. Such a result brings about the very wrong that the 1985 Amendment to § 9-3-71(a) was enacted to prevent.

OCGA § 9-3-71(a) states that an action from medical malpractice must be brought with "within two years after the date on which an injury or death arising from a negligent or wrongful act or omission occurred." And the Georgia Supreme Court in *Young v. Williams*, 274 Ga. 845 has stated that "the period of limitation under the current statute begins with the occurrence of an injury, not the performance of a negligent act." It is therefore clearly not the misdiagnosis itself that is the injury, as has been set forth by the Court of Appeals in previous cases, but the injury itself.

OCGA § 9-3-71(a) is unconstitutional as applied herein. Georgia courts have long acknowledged that it is inequitable and unjust for a statute to run if the plaintiff is unaware that a cause of action exists. *See e.g. Allrid v. Emory Univ.*, 249 Ga. 35, 37, 285 S.E.2d 521 (1982) (noting that the medical malpractice statute as then written was "an extremely harsh limitation in application because it has the effect, in many cases, of cutting off rights before there is any knowledge of injury."); *Luem v. Johnson*, 258 Ga. App. 530, 574 S.E.2d 835 (2002) (noting the unfair result where plaintiff could not reasonably have been expected to have known "her legal rights had been invaded until she discovered the causal relationship between the doctor's negligence and her injury."). Not only is this application of the statute unjust, it is unconstitutional.

a. OCGA § 9-3-71(a) denies equal protection of the law to equally situated medical malpractice claimants without a reasonable basis to do so.

"No person shall be denied equal protection of the laws." Ga. Const. Art. 1, § I, ¶ 2; U.S. Const. Amendment XIV. The equal protection clause prohibits the state from treating similarly situated individuals differently by creating disparate categories among them without a rational basis for doing so. *Kelley v. Ga. Dept. of Human Resources*, 269 Ga. 384, 386 (3), 498 S.E.2d 741, 744 (1998). *See also Celotex Corp. v. St. Joseph Hospital*, 259 Ga. 108, 376 S.E.2d 880 (1989) (statute that creates longer statute of limitations for claims against asbestos manufacturers than against other defendants denies equal protection).

Malpractice plaintiffs can be treated differently than other similarly situated plaintiffs in at least three ways. First, they may be treated differently than other tort plaintiffs with a progressive condition, for whom the "discovery rule" clearly applies under general tort law. Second, they may be treated differently than other malpractice plaintiffs, who, due to the nature of their injury know, or have reasonable reason to suspect, that they have been injured due to malpractice, and thus have two years to investigate and prosecute their claim. (For example, a plaintiff whose surgeon erroneously does surgery on the wrong part of the body.) Finally, they may be treated differently than other "misdiagnosis malpractice" plaintiffs who had no symptoms whatsoever. (For example, a breast cancer plaintiff who did not feel a lump to cause her to seek out a physician's opinion, but who simply is later informed that the mammogram was erroneously read).

As applied, OCGA § 9-3-71 treats different classes of medical malpractice victims differently. Georgia courts have long recognized that a statute of limitations that treats different classes of people differently can violate the equal protection clause. In *Shessel v. Stroup*, 253 Ga. 56, 316 S.E.2d 155 (1984), the Georgia Supreme Court held that the Georgia malpractice statute of limitations, as then written, which could bar a claim before it accrued, denied equal protection under the laws and was unconstitutional. The Georgia Supreme Court held that the medical malpractice statute at that time was unconstitutional as applied to a case where the injury did not arise until more than two years after the negligent act occurred. The Georgia Supreme Court concluded that there was no rational basis for treating medical malpractice claimants differently, depending on whether their injury arose more than two years or less than two years after the negligent act. The Georgia Supreme Court found "no substantial relation in this . . . classification to the object of a limitation statute. All who are similarly situated are not treated alike." (*Shessel* was later discussed in *Craven v. Lowndes County Hospital Authority*, 263 Ga. 657, 437 S.E.2d 308 (1993), but that case dealt with the medical malpractice statute of repose, which is not under consideration here.)

After *Shessel*, OCGA § 9-3-71 was amended so that the statute did not begin until the injury arising from the negligent act occurred. Nevertheless, it presents the same equal protection problem identified in *Shessel*: that is, it treats medical misdiagnosis patients differently.

> Lawsuits alleging negligence by misdiagnosis come in two varieties, ones in which the *symptoms of the injury*, usually pain, *exist before the misdiagnosis* and those in which the symptoms

> manifest themselves to the patient days or even years after the mistaken and allegedly negligent, misdiagnosis. [Cits.] '*In most misdiagnosis cases the injury begins immediately upon the misdiagnosis due to the pain, suffering or economic loss sustained by the patient from the time of misdiagnosis until the medical problem is properly diagnosed and treated. The misdiagnosis itself is the injury* and not the subsequent discovery of the proper diagnosis.' [Cits.] Nevertheless, 'this is not always the case.' [Cit.]
>
> Thus: when a diagnosis results in subsequent injury that is difficult or impossible to date precisely, the statute of limitation runs from the date the symptoms attributable to the new injury are manifest to the plaintiff. [Cits.]

Williams v. Young, 247 Ga. App. 337, 339, 543 S.E.2d 737 (2000) (emphasis supplied). This rule has been cited by the Georgia Court of Appeals in numerous cases. *Walker v. Melton*, 227 Ga. App. 149 (1997); *Zechman v. Thigpen*, 210 Ga. App. 726, 434 S.E.2d 475 (1993); *Oliver v. Sutton*, 246 Ga. App. 436 (2000); *Charter Peachford Behavioral Health Sys., Inc. v. Kohout*, 233 Ga. App. 452 (1998); *Ford v. Dove*, 218 Ga. App. 828 (1995); *Frankel v. Clark*, 213 Ga. App. 222 (1994); *Stone v. Radiology Servs. P.A.*, 206 Ga. App. 851 (1992); *Surgery Assoc. P.C. v. Kearby*, 199 Ga. App. 716 (1991). There are, however, no cases in which the Georgia Supreme Court has endorsed this rule.

The distinction between the two groups of misdiagnosis cases appears to turn on the idea that where the patient presents for treatment of an existing condition that is misdiagnosed the injury "begins" at the time of misdiagnosis, and therefore "the misdiagnosis itself is the injury." However, in every misdiagnosis case the actionable

injury "begins" at misdiagnosis in the sense that the physician's failure to treat or improper treatment based on the misdiagnosis causes the original condition to worsen and eventually produce those physical symptoms which are the "ascertainable injury." But it is the *consequence* of the physician's misdiagnosis – the worsening of the plaintiff's original condition into an actionable injury – rather than the beginning of this injury at misdiagnosis that will give rise to a claim for damages and trigger OCGA § 9-3-71(a).

In latent injury or "subsequent injury" cases the Georgia Court of Appeals has recognized the actionable injury is that which develops over time and reflects the consequence of the physician's negligence on the patient. The actionable injury is a "new injury," distinct from the latent condition that was misdiagnosed, *Walker v. Melton*, supra, or that the physician failed to diagnose, *Staples v. Bhatti*, 220 Ga. App. 404, 469 S.E.2d 490 (1996). The Georgia Court of Appeals has held that the statute of limitation begins to run in these "subsequent injury" cases when "the symptoms attributable to the new injury are manifest to the plaintiff." *Williams v. Young*, 247 Ga. App. at 339. "When misdiagnosis results in subsequent injury that is difficult or impossible to date precisely, the statute of limitation begins to run from the date symptoms attributable to the new injury are manifest to the plaintiff." *Walker v. Melton*, 227 Ga. App. 149, 151, 489 S.E.2d 63 (1997) (spinal injury that developed over time from radiologist's failure to diagnose plaintiff's broken back from x-rays arose when plaintiff felt renewed pain 1½ years after misdiagnosis); *Staples v. Bhatti*, 220 Ga. App. 404, 469 S.E.2d 490 (1996) (metastasis that developed over time from failure to diagnose a cancerous breast tumor did not arise under § 9-3-71(a) until plaintiff

experienced pain in her breast four years after misdiagnosis); *Whitaker v. Zirkle*, 188 Ga. App. 706, 373 S.E.2d 106 (1988) (injury that developed over time from misdiagnosis of cancerous mole did not arise until 8 years following misdiagnosis when bruises appeared at the site of the mole); *Zechman v. Thigpen*, 210 Ga. App. 726, 434 S.E.2d 475 (1993) (injury did not arise from failure to diagnose Coats' disease until child experienced pain in her eye five years after the misdiagnosis; suit filed more than 5 years after the negligent act was within the statute of limitation, but barred by the statute of repose). In each of these cases the plaintiff's "new injury" developed into a far worse injury as a result of the misdiagnosis and failure to treat, and was the consequence of the physician's negligence.

For example, in *Staples v. Bhatti*, supra, the plaintiff's mammogram indicated a cancerous mass which the physician failed to diagnose. Theoretically her injury "began" at the time of misdiagnosis, because the cancer was left untreated, metastasized and spread to her lymph nodes. Had it been properly diagnosed and treated, her original condition would not have worsened. However, the actionable injury that triggered OCGA § 9-3-71 arose years after the misdiagnosis when the plaintiff experienced pain in her breast. The Georgia Court of Appeals held that the cause of action did not accrue and the statute of limitation did not commence until symptoms of this "new injury" were physically manifested. The reasoning was correct because the plaintiff's "new injury" was the consequence of the defendant's negligence in misdiagnosing and failing to treat the condition. *Vitner v. Miller*, 208 Ga. App. 306, 307 (1993); *Walker v. Melton*, supra.

b. There is no reasonable relationship between the classifications created by OCGA § 9-3-71 and the goal of encouraging the prompt filing of claims.

While this Court has recognized that the Fourteenth Amendment does not deny the States the power to treat different classes of people in different ways, the Equal Protection Clause DOES "deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute," *Reed v. Reed, infra.* In determining whether a statutory classification is constitutional, the Court applies the "rational relationship" test: that is, the classification must be "'reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of this legislation, so that all persons similarly circumstanced shall be treated alike.'" *See Reed v. Reed*, 92 S. Ct. 251, 253-254, 404 U.S. 71, 75-76, 30 L. Ed. 2d 225 (1971), quoting from *Royster Guano Co. v. Virginia*, 253 U.S. 412, 40 S. Ct. 560, 561, 64 L. Ed. 989 (1920).

The relevant inquiry, then, is whether the classification created here furthers the objective of the statute that created the classification, the statute of limitations. "Statutes of limitation . . . in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims *that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.*" (Emphasis added). *See Allrid v. Emory University*, 249 Ga. 35, 39, 285 S.E.2d 521 (1982), quoting this Court in *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-9, 64 S. Ct. 582, 586, 88 L. Ed. 788 (1943). In the present

situation, there is no basis for any argument that evidence has been lost, memories faded or witnesses disappeared.

c. OCGA § 9-3-71(a) denies due process of law to equally situated medical malpractice claimants without a reasonable basis to do so.

"No person shall be deprived of life, liberty or property except by due process of law." Ga. Const. Art. I, § 1, ¶ 1; *see also* U.S. Const. Amendment XIV. "A litigant does have a property interest in her cause of action that she may not be deprived of without due process." *See Ga. Dept. of Medical Assistance v. Columbia Convalescent Center*, 265 Ga. 638, 639, 458 S.E.2d 635, 637 (1995). The due process clause does not permit an application of the statute of limitations that would deprive plaintiff of the two-year statutory period for identifying and pursuing a claim against her doctor which should be treated differently for different classes of malpractice plaintiffs. The medical malpractice statute of limitations does not comport with the due process clause and is unconstitutional as applied to Petitioner.

There can be no question here that Petitioner was unaware that she had dislocated bones until she got a second opinion. "Patients are entitled to rely on their doctors' diagnoses in deciding on a course of treatment." *Breyne v. Potter*, 258 Ga. App. 728, 730, 574 S.E.2d 916, 920 (2002); citing *Stephen Brown Radiology v. Gowers*, 157 Ga. App. 770, 278 S.E.2d 653 (1981) (stating that the statute of limitation on medical malpractice claims does not begin to run where the physician had assured the patient that the injuries were slight. Compare here, where Respondent Young informed Petitioner that she simply had a chronic condition she would have to live with.).

d. The Georgia Supreme Court vacated its second writ of certiorari on the eve of the expiration of a second term of court.

The issues in this case are of such importance and in such a state of confusion that the Georgia Supreme Court has twice granted certiorari in this case. On the second appearance of this case in the Court of Appeals on remand from the Georgia Supreme Court's first ruling, the issues were still unaddressed and the Georgia Supreme Court granted certiorari again to answer this question:

> In a medical malpractice action based upon the physician's alleged misdiagnosis of the patient's condition, what is "the date on which an injury . . . occurred" for purposes of commencement of the two year statute of limitations established by OCGA § 9-3-71(a)?

Although the Georgia Supreme Court ultimately decided that the writ had been improvidently granted, two justices dissented from that order, which came at or near the conclusion of the Georgia Supreme Court's second term to consider the case. The power of the Georgia Supreme Court to continue a case to a third term was once explicit. (*Dougherty v. Fogle*, 48 Ga. 615 (1873), *Worthy v. Tate*, 42 Ga. 392 (1871), *Griffith v. Mitchell*, 117 Ga. 476 (1903)) and certainly remains implicit within the inherent power of the Georgia Supreme Court. *See Garcia v. Miller*, 261 Ga. 531 (1991). *See also* the Georgia Supreme Court's decision in *Waldrip v. Head*, 272 Ga. 572 (2000).

> *Even if the legislature had not expressly provided this authority*, this Court has the inherent power to maintain a court system that provides for the administration of justice in an orderly and efficient manner. As another court has explained, 'A court uses its inherent power when constitutional

> provisions, statutes, or court rules fail to supply answers to problems or when courts find themselves compelled to provide solutions that enable the litigative process to proceed smoothly.' (Emphasis supplied.)

If full review on certiorari is not granted by this court, Petitioner suggests that this Court has the authority to grant the writ for the purpose of vacating the Georgia Supreme Court's withdrawal of its writ of certiorari, and remanding this case for further proceedings to answer the very question that the Georgia Supreme Court felt was significant enough to grant certiorari in this case on for a second time.

CONCLUSION

For the reasons stated above, a writ of certiorari should issue to review and reverse the judgments below. In the alternative, and recognizing that this Court cannot take every meritorious case that is presented to it due to the sheer volume of petitions for writ of certiorari presented to it, Petitioner requests that this Court, in the alternative, reverse and remand this case to the Georgia Supreme Court for further proceedings.

Respectfully submitted this 10th day of March, 2004.

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IN THE SUPERIOR COURT
OF DOUGHERTY COUNTY
STATE OF GEORGIA

MARGARET WILLIAMS,	:	
Plaintiff,	:	
v.	:	CIVIL ACTION FILE
DEVELL R. YOUNG, M.D., P.C. and DEVELL R. YOUNG, M.D.	:	NO. 98CV2429-2
Defendants.	:	

ORDER ON DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT

(Filed Nov. 23, 1999)

Defendants Devell R. Young, M.D. and Devell R. Young, M.D., P.C., moved for summary judgment on the ground the plaintiff's action is barred as a matter of law by the applicable statute of limitations as set forth in O.C.G.A. § 9-3-71 due to the fact that the cause of action arose more than two years prior to October 28, 1998, the date upon which the plaintiff filed the within suit. The Court has considered the pleadings on file, the depositions of the parties, the affidavit of the defendant, Devell R. Young, M.D., the affidavits of Lorrie B. Hayes, M.D., the certified medical records, the undisputed material facts as to which no genuine issue exists, movants' and respondent's written argument and citation of authorities, and the oral argument of counsel at the hearing on October 12, 1999. The Court has also taken into consideration the agreement of counsel for the plaintiff at the hearing on the motion, that Lorrie B. Hayes, M.D., has no personal knowledge of the facts of the case and no information as to

the facts beyond what appears in the medical record, pleadings and depositions of the parties. After due consideration, this Court finds there exists no genuine issue of material fact as to the running of the statute of limitations in that the competent evidence demonstrates as a matter of law the cause of action arose more than two years prior to the filing of the lawsuit.

Accordingly, it is ORDERED AND ADJUDGED that the motion for summary judgment of Devell R. Young, M.D. and Devell R. Young, M.D., P.C. is hereby GRANTED.

ORDERED FURTHER, the Clerk of Dougherty Superior Court is hereby instructed to forward by United States Mail a copy of this order to all counsel of record.

This 22 day of November, 1999.

/s/ Loring A. Gray, Jr.
JUDGE SUPERIOR COURT OF
DOUGHERTY COUNTY, GEORGIA

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the within and foregoing **ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** by mailing a true and accurate copy of the same, postage prepaid, to the following:

Mr. Frank J. Klosik
Attorney at Law
4651A Roswell Rd. N.E.
Atlanta, GA 30342

Mr. Thomas S. Chambless
Attorney at Law
P.O. Box 2008
Albany, GA 31702

Ms. Dawn G. Benson
Attorney at Law
P.O. Box 2008
Albany, GA 31702

This 23rd day of November, 1999.

/s/ Loring A. Gray, Jr.
LORING A. GRAY, JR.
CHIEF JUDGE
Dougherty Superior Court

WHOLE COURT

NOTICE: MOTIONS FOR RECONSIDERATION MUST BE RECEIVED IN OUR CLERK'S OFFICE WITHIN TEN DAYS OF THE DATE OF DECISION to be deemed timely filed. (Court of Appeals Rules 4 and 37, December 23, 1999)

December 1, 2000

In the Court of Appeals of Georgia

A00A1393. WILLIAMS v. YOUNG, M. D., P. C. P-061

POPE, Presiding Judge.

In this medical malpractice action, the trial court granted summary judgment to defendants Devell R. Young, M.D., and Devell R. Young, M.D., P.C., on the ground that the statute of limitations had expired before plaintiff Margaret Williams filed her lawsuit. Williams appeals. For reasons stated below, we have decided to adopt the "continuous treatment" doctrine with respect to our statute of limitations for appropriate medical malpractice actions. Following the newly adopted "continuous treatment" doctrine, we conclude that there was a factual issue regarding the statute of limitations on Williams' lawsuit, and we reserve the decision of the trial court.[1]

Viewed most favorably to Williams, the evidence shows that Williams first sought treatment from Dr. Young on September 29, 1995, complaining of swelling and pain in her left ankle and foot. Williams reported that she was a diabetic and also complained of proteninuria (presence of

[1] Williams' motion to dismiss the appeal is denied.

protein in urine), elevated blood glucose and retinopathy (vision problem associated with diabetes). Dr. Young did not observe any swelling in Williams' foot, although he testified that the absence of swelling at any given moment was not unusual, because proteinuria was a condition which could show evidence of swelling one day, then none the next. Williams went to see Dr. Young repeatedly between September 29, 1995, and September 30, 1996, with complaints about her left foot and leg. Dr. Young treated her with antibiotics and with various medications for diabetes.

At some point in January, 1996, Williams told Dr. Young that the pain had increased in her foot. She claimed that she told Dr. Young that she started having additional pain after she took an awkward step in December, 1995. Williams went to Dr. Young's office repeatedly between March and June 1996, complaining of continuing problems with her left foot, including severe swelling which expanded at times to her groin area.

In June, 1996, Dr. Young prescribed a lymph edema foot pump. Williams did not experience relief by using the pump. At a September 30, 1996 appointment, Williams asked again about her foot. Dr. Young replied: "[t]hat is just lymph edema. That is just a condition you have to live with." He told Williams to return for an office visit in January, 1997. The next day, October 1, 1996, Williams contacted another physician, Dr. Daniel Rhoads, and made an appointment to see him on November 4, 1996.

On November 4, 1996, Dr. Rhoads x-rayed Williams' foot and ankle and diagnosed a dislocation of her talonavicular joint. After leaving Dr. Rhoads' office, Williams called Dr. Young's office, but she did not speak to him.

Later, Williams called again to inform Dr. Young of Dr. Rhoads' diagnosis – that she had three dislocated bones in her foot. Williams testified that Dr. Young said that he did not believe the diagnosis.

On December 10, 1996, Dr. Rhoads performed surgery on Williams' foot to repair the dislocated bones. During Williams' subsequent hospitalization, Dr. Young saw her in consultation for her diabetes. As of January 1998, Dr. Rhoads opined that the long-term prognosis for Williams' foot was not good.

On October 28, 1998, Williams filed the instant action, alleging that Dr. Young committed malpractice when he failed to diagnose the dislocated bones in her foot. Williams' complaint also set forth various other claims, including that Dr. Young failed to properly educate her about her diabetic condition; that he failed to obtain a necessary EKG on her; and that he failed to properly document his treatment of her. Defendants filed a motion for summary judgment, arguing that Williams' action was barred by the two-year statute of limitation, OCGA § 9-3-71 (a). The trial court granted summary judgment for the defendants.

In her sole enumeration of error, Williams argues that the trial court erred in granting the motion. She argues that the telephone consultations with Dr. Young and his continued course of treatment of her extended beyond October 28, 1996, and that therefore her complaint was timely filed. We agree that summary judgment was improper and we reverse.

OCGA § 9-3-71 (a) provides that "an action for medical malpractice shall be brought within two years after the date on which an injury or death arising from a negligent

or wrongful act or omission occurred." This statute, enacted in 1985, changed earlier law by beginning the running of the statute of limitations on the date the injury "occurred" rather than on the date of the negligent act. *Jones v. Lamon*, 206 Ga. App. 842, 845 (1) (426 SE2d 657) (1992). This change was in accord with general tort law which holds that the tort of negligence is not complete until an injury occurs. *Shessel v. Stroup*, 253 Ga. 56 (316 SE2d 155) (1984).

Lawsuits alleging negligence by misdiagnosis come in two varieties, ones in which the symptoms of the injury, usually pain, exist before the misdiagnosis and those in which the symptoms manifest themselves to the patient days or even years after the mistaken, and allegedly negligent, misdiagnosis. Compare *Charter Peachford Behavorial Health System v. Kohout*, 233 Ga. App. 452 (504 SE2d 514) (1998) (physical precedent); *Frankel v. Clark*, 213 Ga. App. 222 (444 SE2d 147) (1994); and *Surgery Assoc. v. Kearby*, 199 Ga. App. 716 (405 SE2d 723) (1991); with *Walker v. Melton*, 227 Ga. App. 149, 150 (1)(b) ((489 SE2d 63) (1997); *Staples v. Bhatti*, 220 Ga. App. 404 (1) (469 SE2d 490) (1996); and *Zechman v. Thigpen*, 210 Ga. App. 726 (3) (437 SE2d 475) (1993).

"In most misdiagnosis cases, the injury begins immediately upon the misdiagnosis due to the pain, suffering or economic loss sustained by the patient from the time of the misdiagnosis until the medical problem is properly diagnosed and treated. The misdiagnosis itself is the injury and not the subsequent discovery of the proper diagnosis." (Punctuation and citations omitted.) *Walker v. Melton*, 227 Ga. App. at 150. See also *Daughtry v. Cohen*, 187 Ga. App. 253 (1) (379 SE2d 18) (1988). "Nevertheless, this is not always the case." *Walker*, 227 Ga. App. at 150. Thus:

> [w]hen a misdiagnosis results in subsequent injury that is difficult or impossible to date precisely, the statute of limitation runs from the date symptoms attributable to the new injury are manifest to the plaintiff. See *Zechmann*, [210 Ga. App.] at 729; see generally *Staples*, [220 Ga. App.] at 405-406 (1). See also *Whitaker*, [188 Ga. App. 706, 708 (1) (374 SE2d 106) (1988)] the date of medical treatment, the statute of limitation commences from the date the injury is discovered.

Walker, 227 Ga. App. at 151. See, e.g., *Ford v. Dove*, 218 Ga. App. 828 (463 SE2d 351) (1995), overruled in part on other grounds, *Ezor v. Thompson*, 241 Ga. 275 (526 SE2d 609) (1994), aff'd, *Thompson v. Ezor*, Case No. S00G0613 (decided October 2, 2000); *Crawford v. Spencer*, 217 Ga. App. 446, 447 (3) (457 SE2d 711) (1995); *Knight v. Sturm*, 212 Ga. App. 391 (1) (442 SE2d 255) (1994). The rule that the injury "occurs" when its symptoms manifest themselves to the patient applies even if the patient is not aware of either the cause of the pain or of the connection between the symptoms and the negligent act or omission. *Henry v. Medical Center, Inc.*, 216 Ga. App. 893, 894 (2) (456 SE2d 216) (1995); *Bryant v. Crider*, 209 Ga. App. 623 (3) (434 SE2d 161) (1993); *Jones v. Lamon*, 206 Ga. App. at 846.

A harsh result can occur when the symptoms manifest themselves at or before misdiagnosis, but the patient is not aware until sometime later that the diagnosis was

erroneous.[2] That is the situation in this case in which the symptoms – pain and swelling in Williams' leg – manifested themselves before Dr. Young made his diagnosis of lymph edema. The record is clear that the symptoms existed in September 1995, the date of Williams' first visit to Dr. Young for foot discomfort. If we were to interpret the alleged malpractice as "occurring" when the symptoms manifested themselves to Williams, the statute of limitation would have expired before her complaint was filed on October 28, 1998. Similarly, if we use the first date of Dr. Young's alleged misdiagnosis of Williams' condition, again September, 1995, as the date on which the statute began running, the statute of limitations expired before she filed suit.

Yet there is evidence that Williams continued under Dr. Young's care until at least November 1996, when in a telephone conversation Dr. Young explicitly rejected Dr. Rhoads' diagnosis of her foot. And there is expert evidence in the record that these telephone consultations were part of Dr. Young's medical treatment of Williams.

Williams urges us to read the statute of limitations expansively by holding that the alleged negligence continues, for purposes of calculating the running of the statute, as long as the plaintiff remains in "continuous treatment."

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[2] But see *Whitaker v. Zirkle*, 188 Ga. App. 706, 708 (374 SE2d 106) (1988) ("When an injury has occurred subsequent to the date of medical treatment, the statute of limitations commences from the date the injury is discovered.") *Whitaker* has been limited to cases in which the patient discovers the symptoms, but not the cause, subsequent to the treatment. See *Jones v. Lamon*, 206 Ga. App. at 846; *Walker v. Melton*, 227 Ga. App. at 150; *Staples v. Bhatti*, 220 Ga. App. at 404.

Although in the past this court has declined to adopt this doctrine, see *Ford*, 218 Ga. App. at 828; *Crawford*, 217 Ga. App. at 449; we conclude that the better course is to adopt the doctrine in appropriate medical malpractice cases alleging misdiagnosis.

The continuing treatment doctrine provides:

> If the treatment by the doctor is a continuing course and the patient's illness, injury or condition is of such a nature as to impose on the doctor a duty of continuous treatment and care, the statute does not commence running until treatment by the doctor for the particular disease or condition involved has terminated – unless during treatment the patient learns or should learn of negligence, in which case the statute runs from the time of discovery, actual or constructive. *Taylor v. Phillips*, 801 SW2d 303, 304 (Ark. 1990) (quoting 1 D. Lousell and H. Williams, Medical Malpractice, § 13.08 (1982)). There are several bases for the rationale underlying this doctrine: (1) a patient should properly place trust and confidence in his physician and should be excused from challenging the quality of care being rendered to him until that confidential relationship terminates, *Otto v. Nat. Institute of Health*, 815 F.2d 985, 988 (4th Cir. 1987); (2) to require a patient to bring suit against his physician before treatment is terminated would conceivably afford the physician a defense that the patient left before treatment was terminated and before the physician had a chance to effectuate a proper result, *Taylor v. Phillips*, 801 SW2d 303, 305 (Ark. 1990); and (3) the treating physician is in the best position to identify and correct the malpractice. *Cooper v. Kaplan*, 585 NE2d 373, 374 (NY 1991).

(Punctuation, emphasis and footnote omitted.) *Vitner v. Miller*, 208 Ga. App. 306, 308-309 (430 SE2d 671) (1993) (Pope, C. J., concurring specially.)

Significantly, the doctrine comports with OCGA § 9-3-71 (a) not because it delays the occurrence of the injury but because it deems that the negligent act, i.e. the failure to make the proper diagnosis, continues as long as the patient remains under the physician's care. The doctrine is applicable to misdiagnosis cases because each time the physician renders treatment to the patient based on an erroneous diagnosis, he is implicitly repeating the misdiagnosis.[3]

We conclude that when malpractice is claimed to have occurred during a continuous and substantially uninterrupted course of examination and treatment in which a particular illness or condition should have been diagnosed in the exercise of reasonable care, the statute of limitations begins to run when the improper course of examination and treatment, if any, for the particular malady terminates. See *Farley v. Goode*, 252 SE2d 594, 599 (Va. 1979). In reaching this conclusion we emphasize that although the adoption of the "continuous treatment" doctrine will alter our interpretation of the statute of limitations, the adoption of this doctrine does not affect the applicability of the statute of repose contained in OCGA § 9-3-71 (b).

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[3] Decisions rejecting a "discovery" rule to govern the statute are not relevant to the "continuous treatment" theory. Plaintiffs who invoke the "continuous treatment" doctrine are attempting to postpone the negligent act rather than postponing the discovery of the injury.

There is considerable authority for the "continuous treatment" rule in other jurisdictions. See, e.g., *Otto v. Nat'l Institute of Health*, 815 F2d 985 (4th Cir. 1987) (Federal Tort Claims Act case); *Taylor v. Phillips*, 801 SW2d 303 (Ark. 1990); *Cooper v. Kaplan*, 78 NY2d 1103 (585 NE2d 373) (1962); *Borgia v. City of New York*, 12 NY2d 151 (187 NE2d 777) (1962); *Swift v. Colman*, 608 NYS2d 717 (196 AD2d 150) (1994); *Vinklarek v. Cane*, 691 SW2d 108 (Tex. App. 1985); *Caughell v. Caughell*, 876 P2d 898 (Wash. 1994); *Metzger v. Kalke*, 709 P2d 414 (Wyo. 1985).[4] "Since 1940, there has been a steady trend toward judicial acceptance of the continuing treatment approach. [Cits.]" *Lane v. Lane*, 295 Ark. 671, 675 (752 SW2d 25) (1988) (lists 16 jurisdictions that had adopted the doctrine by 1988). And several of the courts which have declined to adopt the continuous treatment rule have done so on the basis that the specific wording of the applicable statute of limitations made application of the doctrine unnecessary. See, e.g., *Hill v. Fitzgerald*, 501 A2d 27, 32 (III) (Md. 1985) (common law continuous treatment doctrine did not survive adoption of the discovery rule in Maryland); *Comstock v. Collier*, 737 P2d 845, 849 (Colo. 1987) (continuous treatment doctrine does not apply when statute of limitations incorporates the discovery rule but does apply to statute of repose which begins to run on the date of the act or omission giving rise to the injury).

Nevertheless, we recognize that in adopting the continuous treatment doctrine, we must overrule those

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[4] The "continuous treatment" doctrine differs from the "continuous tort" doctrine. Compare *Abend v. Klandt*, 243 Ga. App. 271 (531 SE2d 722) (2000).

cases in which this court has specifically rejected this doctrine. Thus, to the extent that *Ford v. Dove*, 218 Ga. App. 828[5]; and *Crawford v. Spencer*, 217 Ga. App. at 449 (3), conflict with this opinion, they are overruled. In most of the medical malpractice cases decided since the 1985 amendment to the statute, the continuous treatment doctrine was either inapplicable or was not raised by the parties. See, e. g., *Oliver v. Sutton*, Case Number A00A1547, decided October 19, 2000.

Using the continuous treatment doctrine, the record shows that Williams raised a jury issue as to whether her treatment by Dr. Young continued until October 28, 1996. There is evidence of a telephone conversation in November 1996, in which Dr. Young explicitly rejected Dr. Rhoads' diagnosis and implicitly reiterated his diagnosis by advising her to continue treatment he had recommended. Moreover, Dr. Young treated Williams for her diabetes during her December 1996 hospitalization.

Under the continuous treatment doctrine a plaintiff must show that (1) the doctor's treatment is a continuing course and (2) that "the patient's illness, injury or condition is of such a nature as to impose on the physician a duty of continuing treatment and care." See *Vitner v. Miller*, supra at 308 (Pope. C. J., concurring specially). Here, there was a jury issue as to these elements. Moreover, given the circumstances of this case we cannot say as a matter of law, that Williams knew or should have known of the alleged misdiagnosis, so as to render the continuous

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[5] As noted above, *Ford* was overruled in part on other grounds in *Ezor v. Thompson*, 241 Ga. 275.

treatment doctrine inapplicable. Accordingly, the trial court erred in granting defendants' motion for summary judgment.

Judgment reversed. Johnson, C. J., Smith, P. J., Ruffin, Eldridge, Barnes, Miller, Ellington and Mikell, JJ., concur. Andrews, P. J., and Blackburn, P. J., dissent. Phipps, J., not participating.

ANDREWS, Presiding Judge.

I respectfully dissent.

As the majority points out, the law is well-settled in Georgia that "[i]n most misdiagnosis cases, the injury begins immediately upon the misdiagnosis due to the pain, suffering or economic loss sustained by the patient from the time of the misdiagnosis until the medical problem is properly diagnosed and treated . . . The misdiagnosis itself is the injury and not the subsequent discovery of the proper diagnosis." *Whitaker v. Zirkle*, 188 Ga. App. 706, 707 (374 SE2d 106) (1988), cert. denied, 188 Ga. App. 913. "OCGA § 9-3-71 (a); *Ford v. Dove*, 218 Ga. App. 828, 831 (3) (463 SE2d 351) (1995); *Henry v. Medical Center*, 216 Ga. App. 893, 894 (2) (456 SE2d 216) (1995); *Crawford v. Spencer*, 217 Ga. App. 446, 448 (3) (457 SE2d 711) (1995); *Frankel v. Clark*, 213 Ga. App. 222, 223 (444 SE2d 147) (1994); *Bryant v. Crider*, [209 Ga. App. 623, 626 (3) (434 SE2d 161) (1993)]." *Charter v. Peachford v. Kohout*, 233 Ga. App. 452, 455 (504 SE2d 514) (1998). The fact that the plaintiff did not know the medical cause of her suffering does not affect the running of the statute of limitations under OCGA § 9-3-71 (a) where the injury has occurred and physically manifested itself to her. *Henry v. Medical*

Center, 216 Ga. App. 893, 894 (456 SE2d 216) (1995); *Frankel v. Clark*, 213 Ga. App. 222, 223 (444 SE2d 147) (1994). It is apparent from the law stated above that in order to make the change advocated by the majority opinion, the majority is overruling a long line of cases, not just the two named in the opinion.

Most importantly, the Georgia Supreme Court has clearly held that the plain language of OCGA § 9-3-71 does not permit the interpretation advanced by the majority. In *Crowe v. Humana*, 263 Ga. 833, 834 (439 SE2d 654) (1994), the court held:

> The Crowes, however, ask us to hold that the cause of action "arose," and thus the period of limitation commenced, when they discovered that the appellees' negligence caused Ashley's injuries. *We find that initiating the period of limitation in a medical malpractice action when the alleged negligence is first discovered would be contrary to the plain language of §§ 9-3-71* and 9-3-73.

The Supreme Court reaffirmed this holding and cited to *Ford v. Dove* and *Crawford v. Spencer* as authority in *Hunter, Maclean &c v. Frame*, 269 Ga. 844, 849 (507 SE2d 411) (1998). In that case, the court held that the statute of limitations was not tolled in legal malpractice actions simply because the attorneys continued to represent the plaintiff. "That result would essentially be an adoption of the 'continuing representation rule,' which has been consistently rejected by Georgia courts in the malpractice context, (citing to *Ford v. Dove* and *Crawford v. Spencer*) and which we expressly decline to adopt in this case." Id. at 849. Thus, the Supreme Court has expressly rejected the continuing treatment rationale advanced by the

majority. This Court is bound by the decisions of the Supreme Court. 1983 Ga. Const. Art. VI, Sec. VI, Para. VI; *Dester v. Dester*, 240 Ga. App. 711, 712 (523 SE2d 635) (1999).

Finally, even if the Supreme Court had not already spoken, the majority opinion overrules a long line of cases interpreting OCGA § 9-3-71 (a).

> The application of the doctrine of stare decisis is essential to the performance of a well-ordered system of jurisprudence. In most instances, it is of more practical utility to have the law settled and to let it remain so, than to open it up to new constructions, as the personnel of the court may change, even though grave doubt may arise as to the correctness of the interpretation originally given to it.

Etkind v. Suarez, 271 Ga. 352, 357 (519 SE2d 210) (1999).

> Even those who regard stare decisis with something less than enthusiasm recognize that the principle has even greater weight where the precedent relates to interpretation of a statute. A reinterpretation of a statute after the General Assembly's implicit acceptance of the original interpretation would constitute a judicial usurpation of the legislative function.

(Citations and punctuation omitted.) Id. at 358.

Although the majority claims there are important public policy reasons for changing our interpretation of this statute, the legislature has not seen fit to do so and any attempt on our part to make this change goes beyond

the limits of judicial restraint and into the area of unauthorized judicial legislation. *Clabogh v. Rachwal*, 176 Ga. App. 212, 215 (335 SE2d 648) (1985).

I am authorized to state that Presiding Judge Blackburn joins in this dissent.

SUPREME COURT OF GEORGIA

ATLANTA JUN 12, 2001

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Case No. S01G0589

DEVELL R. YOUNG et al. v. MARGARET WILLIAMS

Upon consideration of the petition for certiorari filed to review the judgment of the Court of Appeals in this case, it is ordered that the certiorari be granted and that this order operate as the writ. The case will be automatically assigned to the calendar for September 2001 for hearing upon the record now of file.

C/A Case No. A00A1393

All the Justices concur.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

(SEAL)

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

/s/ Lynn M. Stinchcomb Chief Deputy Clerk

(SEAL)

SUPREME COURT OF GEORGIA
Clerk's Office

Atlanta, June 12, 2001

TO ALL COUNSEL:

Case No.
S00C0589
DEVELL R. YOUNG et al. v. MARGARET WILLIAMS

The Supreme Court today granted the writ of certiorari in this case. All the Justices concur.

* * *

This case will be assigned to the **September 2001,** oral argument calendar automatically under Supreme Court Rule 50 (2), as amended September 13, 1996.

This Court is particularly concerned with the following issue or issues:

> Did the Court of Appeals correctly adopt the doctrine of "continuous treatment" in medical malpractice cases involving misdiagnosis, thus deeming the negligent act to continue as long as the patient remains under the physician's care for the particular disease or condition, for purposes of the applicable statute of limitations, OCGA § 9-3-71 (a)?

Briefs should be submitted only on these points. See Supreme Court Rule 45.

Sincerely,
Sherie M. Welch, Clerk

In the Supreme Court of Georgia

Decided: Mar. 11, 2002

S01G0589. YOUNG et al. v. WILLIAMS

BENHAM, Justice.

On October 28, 1998, appellee Margaret Williams filed a medical malpractice action against appellants Dr. Devell R. Young and his professional corporation, alleging Dr. Young had failed to diagnose dislocated bones in her left foot. The trial court granted summary judgment to the defendants/appellants on the ground that the two-year statute of limitation applicable to medical malpractice actions barred the action. OCGA § 9-3-71(a). On appeal, the Court of Appeals adopted the "continuous treatment doctrine" in medical malpractice actions based on misdiagnosis and reversed the trial court's judgment because there was a question of fact whether Dr. Young had treated Ms. Williams in the two years preceding the filing of her lawsuit. *Williams v. Young*, 247 Ga. App. 337 (543 SE2d 737) (2000). We granted appellants' petition for a writ of certiorari to examine the Court of Appeals' introduction of the continuous treatment doctrine into malpractice actions in Georgia.[1]

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[1] In granting the petition for writ of certiorari, we asked the parties:

> Did the Court of Appeals correctly adopt the doctrine of "continuous treatment" in medical malpractice cases involving misdiagnosis, thus deeming the negligent act to continue as long as the patient remains under the physician's care for the particular disease or condition, for purposes of the applicable statute of limitation, OCGA § 9-3-71(a)?

Appellee, who suffers from diabetes, first sought treatment from Dr. Young for swelling and pain in her left ankle and foot in September 1995. In June 1996, Dr. Young prescribed a lymph edema foot pump. In response to appellee's repeated complaints about her foot, Dr. Young told her on September 30, 1996, that her condition was a permanent one with which she had to live. Five weeks later, in early November, 1996, appellee saw another physician about her foot. The second physician took an x-ray of appellee's foot and diagnosed a dislocation of her talonavicular joint with subluxation of a calcaneal cuboid joint of the ankle. Thereafter, appellee telephonically informed Dr. Young of the second physician's diagnosis. The second physician performed surgery in December 1996 to repair the three dislocated bones, and Dr. Young saw appellee with regard to her diabetes during her hospital stay following the surgery. Appellee filed her complaint alleging medical malpractice/failure to diagnose on the part of Dr. Young one year and 51 weeks after the second physician's diagnosis.

OCGA § 9-3-71(a) provides that "an action for medical malpractice shall be brought within two years after the date on which an injury or death arising from a negligent or wrongful act or omission occurred." It was enacted in 1985 after this Court ruled that its predecessor, under which the period of limitation commenced on the date on which the negligent or wrongful act occurred was an unconstitutional denial of equal protection when the injury or death did not occur within two years of the negligent act. *Shessel v. Stroup*, 253 Ga. 56 (316 SE2d 155)

(1984); *Clark v. Singer*, 250 Ga. 470 (290 SE2d 484) (1983).[2] The "continuous treatment" doctrine adopted by the Court of Appeals in the case at bar modifies the statute of limitation by changing its commencement from the date on which the injury occurred to the date on which "treatment by the doctor for the particular disease or condition involved has terminated – unless during treatment the patient learns or should learn of negligence, in which case the statute runs from the time of discovery. . . ." *Williams v. Young*, 247 Ga. App. at 340.

In order to make the continuous treatment doctrine part of the statute of limitation in medical malpractice cases alleging misdiagnosis, the Court of appeals overruled cases in which that court had declined to adopt the doctrine in medical malpractice cases in general (*Crawford v. Spencer*, 217 Ga. App. 446, 449 (457 SE2d 711) (1995)), and in "misdiagnosis" medical malpractice cases. *Ford v. Dove*, 218 Ga. App. 828 (2) (463 SE2d 351) (1995). We endorsed the Court of appeals' refusal to adopt the continuous treatment doctrine when we cited *Ford* and *Crawford* in support of our express declination to adopt the "continuing representation rule" to modify the commencement of the statute of limitation in legal malpractice claims. *Hunter, McLean, Exley & Dunn Frame*, 269 Ga. 844, 849 (507 SE2d 411) (1998). In point of fact, the continuous treatment doctrine, which "deems that the *negligent act* . . . continues as long as the patient remains

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[2] In those cases, the Court labeled as arbitrary and without rational basis the imposition of a period of limitation which could be exhausted before the cause of action accrued. Id., 253 Ga. at 58; 250 Ga. at 472.

under the physician's care" (*Williams v. Young*, supra, 244 Ga. App. at 341) (emphasis added), is more appropriately incorporated into a statute of limitation that commences upon the occurrence of the negligent act. See, e.g., *Lane v. Lane*, 295 Ark. 671 (752 SW2d 25) (1988) and Ark. Code Ann. 16-114-203 (1987), which provides for a two-year statute of limitation that commences when the cause of action accrues, "which shall be the date of the wrongful act complained of and no other time"; *Comstock v. Collier*, 737 P2d 845 (Colo. 1987) (Colorado's period of repose, § 13-80-105(1), 6 C.R.S., commences with the act or omission giving rise to the malpractice action); *Thatcher v. De Tar*, 173 SW2d 760 (Mo. 1943), and § 1016 Mo.Rev.St.Ann. (1939), which stated suit had to be filed within two years of the act of negligence complained of; *Kern v. St. Joseph Hospital*, 102 N.M. 952 (697 P2d 135) (1985), and NMSA 1978 41-5-13, which states that a claim must be filed "within 3 years after the date that the act of malpractice occurred;" *Borgia v. City of New York*, 12 NYS2d 151 (187 NE2d 777) (1962), where notice of claim was required to be given within 90 days after a claim "accrued," and court, rather than construing "accrued" to be the date of the negligent act, construed it to be the end of a continuous course of treatment; *Ballenger v. Crowell*, 38 N.C. App. (247 SE2d 287) (1978), where statute of limitation required suit to be filed within three years of the negligent conduct; *Bixler v. Bowman*, 24 Wn.App. 815 (614 P2d 1290) (1980), where an action against a physician for professional negligence had to be commenced within 3 years of the date of the alleged wrongful act; and *Metzger v. Kalke*, 709 P2d 414 (Wyo. 1985), where a medical malpractice action had to be initiated within 2 years of the wrongful act or omission, with some exceptions. See also *Farley v. Goode*, 219 Va. 969 (252 SE2d 594) (1979), where

Va. Code § 8.01-243(A) states that a case must be brought within two years of the accrual of the right to bring suit and the cause of action accrues when the physician's improper exam and treatment for the malady complained of terminates; Tex. Rev. Civ. Stat. Art. 4590i(J) (§ 10.01), which states that a health care liability claim must be commenced within 2 years of the occurrence of the breach or the tort or within two years of the completion of the medical or health-care treatment that is the subject of the complaint. While Georgia had such a medical malpractice statute of limitation from 1976-1985, the period of limitation under the current statute begins with the occurrence of an injury, not the performance of a negligent act.

A statute of limitation has as its purpose the limiting of the time period in which an action may be brought, thereby providing a date certain after which potential defendants can no longer be held liable for claims brought on such actions. *U.S. Fidelity &c Co. v. Rome Concrete Pipe Co.*, 256 Ga. 661, 663 (353 SE2d 15) (1987). It is "a procedural rule limiting the time in which a party may bring an action for a right which has already accrued." *Craven v. Lowndes County Hosp. Auth.*, 263 Ga. 657 (2) (437 SE2d 308) (1993). "[P]rescribing periods of limitation is a legislative, not a judicial, function. . . ." *Hunter, McLean &c v. Frame*, supra, 269 Ga. at 846. The General Assembly has determined that medical malpractice actions must be filed within two years of the occurrence of injury or death arising from a negligent or wrongful act or omission. OCGA § 9-3-71(a). The legislatively-prescribed statute of limitation does not provide for the commencement of the period of limitation upon the termination of the health-care provider's treatment of the patient, and the judicial branch is not empowered to engraft such a

provision on to what the legislature has enacted. Accordingly, we reverse the judgment of the Court of Appeals that resulted from the court's adoption of the continuous treatment doctrine, and we remand the case to the Court of Appeals for further proceedings consistent with this opinion.

Judgment reversed and case remanded. All the Justices concur, except Sears, P.J., who concurs in the judgment only.

CARLEY, Justice, concurring.

Although a recognition of the "continuous treatment" theory in medical malpractice cases certainly has much to commend it, I am compelled to agree with the majority for the reasons set forth hereinafter. Since 1985, the period of limitations for medical negligence cases starts on the date that the injury or death occurs. Thus, the focus of current law is on the adverse consequences of the allegedly negligent acts without regard to when the negligent act occurred the ensuing course of treatment, or discovery by the patient. In construing the existing law, this Court has rejected the comparable "continuing representation" theory in legal malpractice cases. *Hunter, McLean, Exley & Dunn v. Frame*, 269 Ga. 844 (507 SE2d 411) (1998). Thus adherence to the doctrines of stare decisis and separation of powers requires that we reject that principle in medical malpractice cases, and await a legislative response. See *Abernathy v. City of Albany*, 269 Ga. 88 (495 SE2d 13) (1998).

We are reversing the Court of Appeal's reversal of Dr. Young's motion for summary judgment pursuant to the

inapplicable "continuing treatment" theory, but we are not affirming the trial court's grant of that motion based upon a proper analysis under OCGA § 9-3-71(a). Instead, we are remanding the case for "further proceedings consistent with this opinion." Upon remand, the Court of Appeals must, therefore, determine when the statute of limitations began to run on Ms. Williams' misdiagnosis claim and whether she filed her action within two years of that date. See *Walker v. Melton*, 227 Ga. App. 149, 150(1)(b) (489 SE2d 63) (1997).

I am authorized to state that Presiding Justice Sears and Justice Hunstein join in this opinion.

GEORGIA COURT OF APPEALS

A00A1393.
WILLIAMS v. DEVELL R. YOUNG, M.D., P.C. et al.
(575 SE2d 648)

POPE, Senior Appellate Judge.

The procedural history of this case is lengthy. On October 28, 1998, Margaret Williams filed a medical malpractice action against Dr. Devell R. Young and his professional corporation, alleging that Dr. Young had failed to diagnose dislocated bones in her left foot. The Dougherty County Superior Court granted summary judgment to the defendants, and Williams appealed.

In *Williams v. Devell R. Young, M.D., P.C.,* 247 Ga. App. 337 (543 SE2d 737) (2000), overruled by *Young v. Williams,* 274 Ga. 845 (560 SE2d 690) (2002), this Court adopted the "continuous treatment" doctrine and reversed the trial court's grant of summary judgment, concluding that there was a factual issue as to whether Dr. Young had treated Williams in the two years preceding the filing of her lawsuit.

The Supreme Court granted the defendants' petition for a writ of certiorari to examine this Court's adoption of the continuous treatment doctrine for malpractice actions. In *Young v. Williams,* 274 Ga. 845, the Supreme Court reversed this Court's decision, concluding that under OCGA § 9-3-71 (a), the period of limitation "begins with the occurrence of an injury, not the performance of a negligent act." Id. at 847. Furthermore, the Supreme Court found that the task of prescribing periods of limitation was a legislative, not a judicial function. Id. at 848, citing *Hunter, Maclean, Exley & Dunn v. Frame,* 269 Ga. 844, 849 (507 SE2d 411) (1998). Accordingly, the Court

reversed this Court's decision to adopt the continuous treatment doctrine and remanded the case for proceedings consistent with its opinion. Based on the Supreme Court's decision, we vacate our earlier decision, and the judgment of the Supreme Court is made the judgment of this Court.

We now turn to Williams' sole enumeration of error in which she argues that the trial court erred in granting the defendants' motion for summary judgment on the basis that the suit was barred by the statute of limitation.

To repeat the factual context out of which this case arose:

> [Williams,] who suffers from diabetes, first sought treatment from Dr. Young for swelling and pain in her left ankle and foot in September 1995. In June 1996, Dr. Young prescribed a lymph edema foot pump. In response to appellee's repeated complaints about her foot, Dr. Young told her on September 30, 1996, that her condition was a permanent one with which she had to live. Five weeks later, in early November 1996, appellee saw another physician about her foot. The second physician took an x-ray of appellee's foot and diagnosed a dislocation of her talonavicular joint with subluxation of the calcaneal cuboid joint of the ankle. Thereafter, appellee telephonically informed Dr. Young of the second physician's diagnosis. The second physician performed surgery in December 1996 to repair the three dislocated bones, and Dr. Young saw appellee with regard to her diabetes during her hospital stay following the surgery. Appellee filed her complaint alleging medical malpractice/failure to diagnose on the part of Dr. Young. . . .

In contending that the trial court erred in granting the motion for summary judgment, Williams claims that the trial court failed to recognize that her telephone consultations with Dr. Young about her injuries and her course of treatment constituted medical care and established the correct date from which the statute of limitation began running. In this regard, she argues that until November 6, 1996, she consulted with Dr. Young about her foot and leg and that on that date he was still providing care and medical opinions to her. Under this argument, Williams contends, the statute of limitation had not expired when she filed her complaint on October 28, 1998. Alternatively, she contends that the November 6, 1996 telephonic consultation with Dr. Young was the date of her injury.

As reiterated by the Supreme Court in *Young v. Williams,* 274 Ga. at 846, the limitation period set forth in OCGA § 9-3-71 (a) runs from the date of injury. Likewise:

> in general, in most misdiagnosis cases, the injury begins immediately upon the misdiagnosis due to the pain, suffering, or economic loss sustained by the patient from the time of the misdiagnosis until the medical problem is properly diagnosed and treated. The misdiagnosis itself is the injury and not the subsequent discovery of the proper diagnosis; thus, the fact that the patient did not know the medical cause of his suffering does not affect the applicability of OCGA § 9-3-71 (a). (Citations and punctuation omitted.) [Cits.]

Hughley v. Frazier, 254 Ga. App. 544, 546 (1) (562 SE2d 821) (2002).[1]

Nevertheless, in *Whitaker v. Zirkle*, 188 Ga. App. 706, 708 (1) (374 SE2d 106) (1988), this Court created a limited exception to the general rule that in misdiagnosis cases the injury is the misdiagnosis itself. In *Whitaker*, the plaintiff claimed that she had cancer which was undiagnosed and resulted in the subsequent metastasis of cancerous cells. The Court concluded that "[w]hen an injury occurs subsequent to the date of medical treatment, the statute of limitation commences from the date the injury is discovered. [Cit.]" Id. at 708 (1). Accordingly, this Court concluded that questions of fact existed as to whether the subsequent metastasis was a separate injury. Similarly, in *Walker v. Melton,* 227 Ga. App. 149, 151 (1) (489 SE2d 63) (1997), this Court stated that "[w]hen a misdiagnosis results in subsequent injury that is difficult or impossible to date precisely, the statute of limitation runs from the date symptoms attributable to the new injury are manifest to the plaintiff." (Citations omitted.)

Unlike the situation in *Whitaker* and *Walker,* the evidence in this case established only that Williams had been continuously experiencing discomfort, pain and swelling in her foot and ankle throughout Dr. Young's treatment of her. In fact in the medical affidavit which she filed with her complaint, the expert notes that Williams sought treatment from Dr. Young on September 29, 1995, complaining of swelling of her feet and ankles. Williams

[1] We decline to overrule the misdiagnosis law, as the amicus curiae brief urges us to do.

testified that the pain had intensified dramatically by January 1996 and that the pain was continuous throughout 1996. The swelling continued until it reached up into her groin area; the swelling in her groin area was present when Williams last saw Dr. Young on September 30, 1996. In fact, there was even evidence that in response to her repeated complaints about her foot, Dr. Young told Williams on September 30, 1996, that her condition was a permanent one that she would have to live with. Accordingly, in this case, any injury Williams may have sustained occurred at the time of the misdiagnosis, certainly before October 28, 1996. See *Hughley v. Frazier,* 254 Ga. App. at 547 (1); *Oliver v. Sutton,* 246 Ga. App. 436, 437-438 (540 SE2d 645) (2000); *Stone v. Radiology Svcs.*, 206 Ga. App. 851, 852 (2) (426 SE2d 663) (1992); compare *Zechmann v. Thigpen,* 210 Ga. App. 726, 728-729 (3) (437 SE2d 475) (1993).

Similarly, we reject Williams' argument that the date of her injury was November 6, 1996 – the date of her telephonic consultation with Dr. Young. As discussed above, the evidence before the trial court established that Williams' foot and leg pain was continuous throughout Dr. Young's treatment of her, and that the injury was present more than two years before she filed suit. See *Hughley v. Frazier,* 254 Ga. App. at 547 (1). Accordingly, the applicable two-year statute of limitation expired before Williams filed her lawsuit, and for this reason, the trial court properly granted summary judgment to the defendants.

We reach this conclusion, as stated above, because of the Supreme Court's reversal in *Young v. Williams,* 274 Ga. at 845, of our earlier decision in *Williams v. Young, M.D., P.C.,* 247 Ga. App. at 337. In reversing this Court's adoption of the "continuous treatment" doctrine, the

Supreme Court emphasized that the job of prescribing periods of limitation is a legislative role, not a judicial one. The Court further stated: "[t]he legislatively-prescribed statute of limitation does not provide for the commencement of the period of limitation upon the termination of the health-care provider's treatment of the patient, and the judicial branch is not empowered to engraft such a provision on to what the legislature has enacted." *Young v. Williams,* 274 Ga. at 848.

In light of the inequities inherent in cases like this one, in which a patient remains under the care of one physician and the statute of limitation expires on her claim, we encourage the General Assembly to look into and remedy this situation by enacting a statute allowing the incorporation of the continuous treatment doctrine into the existing statute of limitation provided for in OCGA § 9-3-71. A legislative enactment to this effect would create a more just statutory scheme for this type of medical malpractice case.

Judgment affirmed. Johnson, P.J., Smith, P.J., Ruffin, P.J., Eldridge, Barnes, Miller, Ellington and Mikell, JJ., concur. Blackburn, C.J., and Andrews, P.J., concur in the judgment only. Phipps, J., disqualified.

DECIDED NOVEMBER 18, 2002 –
RECONSIDERATION DENIED DECEMBER 12, 2002 –
CERT. APPLIED FOR.

Medical malpractice. Dougherty Superior Court. Before Judge Gray.

Greer, Klosik, Daugherty & Swank, Frank J. Klosik, Jr., Robert J. McCune, Jason R. Manton, for appellant.

Watson, Spence, Lowe & Chambless, Thomas S. Chambless, Dawn G. Benson, Charles K. Wainwright II, for appellees.

Smolar, Roseman, Brantley & Seifter, Antoinette D. Johnson, Owen, Gleaton, Egan, Jones & Sweeney, H. Andrew Owen, Jr., Roger E. Harris, amici curiae.

SUPREME COURT OF GEORGIA

ATLANTA MAY 5, 2003

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Case No. S03G0606

MARGARET WILLIAMS v. DEVELL R. YOUNG et al.

Upon consideration of the petition for certiorari filed to review the judgment of the Court of Appeals in this case, it is ordered that the certiorari be granted and that this order operate as the writ. The case will be automatically assigned to the calendar for July 2003 for hearing upon the record now of file.

C/A Case No. A00A1393

All the Justices concur, except Fletcher, C.J., who dissents.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

(SEAL)

Witness my signature and the seal of said court affixed the day and year last above written.

/s/ Lynn M. Stinchcomb Chief Deputy Clerk

(SEAL)

SUPREME COURT OF GEORGIA
Clerk's Office

Atlanta, MAY 5, 2003

TO ALL COUNSEL:

Case No.
S03C0606
MARGARET WILLIAMS v. DEVELL R. YOUNG et al.

The Supreme Court today granted the writ of certiorari in this case. All the Justices concur, except Fletcher, C.J., who dissents.

* * *

This case will be assigned to the **July 2003,** oral argument calendar automatically under Supreme Court Rule 50 (2), as amended September 13, 1996.

This Court is particularly concerned with the following issue or issues:

> In a medical malpractice action based upon the physician's alleged misdiagnosis of the patient's condition, what is "the date on which an injury . . . occurred" for purposes of commencement of the two-year statute of limitations established by OCGA § 9-3-71(a)?

Briefs should be submitted only on these points. See Supreme Court Rule 45.

Sincerely,
Sherie M. Welch, Clerk

SUPREME COURT OF GEORGIA

(SEAL)

Atlanta November 26, 2003

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

It appearing that the enclosed opinion decides a second-term appeal, which must be concluded by the end of the September term on December 16, 2003, it is ordered that a motion for reconsideration, if any, must be **filed and received in the Clerk's office** by 4:30 p.m. on Monday, December 8, 2003.

(SEAL)

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Lynn M. Stinchcomb Chief Deputy Clerk

SUPREME COURT OF GEORGIA
Case No. S03G0606

(SEAL)

Atlanta November 26, 2003

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

MARGARET WILLIAMS v. DEVELL R. YOUNG et al.

After considering this matter, the Court finds the writ of certiorari was improvidently granted and the writ is vacated. All the Justices concur, except Benham and Carley, JJ., who dissent.

Court of Appeals No. A00A1393

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

(SEAL)

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Lynn M. Stinchcomb Chief Deputy Clerk

SUPREME COURT OF GEORGIA
Case No. S03G0606

Atlanta, December 11, 2003

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

MARGARET WILLIAMS v. DEVELL R. YOUNG et al.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Benham and Carley, JJ., who dissent.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Sherie M. Welch, Clerk

IN THE GEORGIA COURT OF APPEALS
STATE OF GEORGIA

MARGARET WILLIAMS Appellant, vs. DEVELL R. YOUNG, M.D., P.C. and DEVELL R. YOUNG, M.D. Appellees.	§ § § § § § § § §	COURT OF APPEALS DOCKET No. A00A1393

AMICUS CURIAE BRIEF ON BEHALF OF THE GEORGIA TRIAL LAWYERS ASSOCIATION FILED IN RESPONSE TO THE ISSUE POSED ON REMAND BY THE SUPREME COURT OF GEORGIA

Eugene C. Brooks, IV
President, Georgia Trial Lawyers Association

Charles M. Cork, III
Georgia Bar Number 187915
Chair, Amicus Curiae Committee Georgia Trial Lawyers Association

Brief Prepared by:
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COMES NOW the Georgia Trial Lawyers Association (GTLA) and pursuant to Georgia Court of Appeals Rule 25 files this Amicus Curiae brief in response to the decision of

the Supreme Court of Georgia in *Young v. Williams*, S01G0589 (Decided March 11, 2002), remanding that case to this Court to determine when an injury arises in a misdiagnosis case within the meaning of OCGA § 9-3-71(a).

The GTLA is a voluntary organization comprised of approximately 2700 trial lawyers licensed to practice in this State whose clients have an interest in this Court's rulings on the important issues presented by this appeal. Over the years the GTLA has consistently appeared as a neutral Amicus Curiae in various matters before the appellate courts of Georgia, as well as before the federal courts. The intent of the GTLA is not to support either the Appellant or the Appellee as Amicus Curiae. Rather, the GTLA desires and attempts to aid the Court to a proper resolution of this case by seeing that the law is correct and correctly followed.

SUMMARY OF PROCEEDINGS AND ARGUMENT

Following the grant of certiorari to *Williams v. Young*, 247 Ga. App. 337, 543 SE2d 737 (2000), the GTLA filed an amicus brief in the Supreme Court of Georgia, urging that this Court's decision be affirmed. The GTLA's position was that the relief offered by the continuous treatment doctrine was necessary to counteract the effect of the erroneous rule that in the majority of misdiagnosis cases the act of "misdiagnosis itself is the injury" which will trigger the statute of limitation in OCGA § 9-3-71(a). *Williams*, 247 Ga. App. at 339. Although the Supreme Court rejected the adoption of the continuous treatment doctrine, it remanded the case for this Court to determine when the actionable injury arises in a misdiagnosis case within the

meaning of OCGA § 9-3-71(a). The GTLA files its brief to address this issue.

In *Young v. Williams*, supra, the Supreme Court concluded that the continuous treatment doctrine was inconsistent with the General Assembly's intent that OCGA § 9-3-71(a) "begins with the occurrence of an injury, not the performance of a negligent act." (Slip op. at 5.) In a written concurrence, Justices Carley, Sears and Hunstein recognized that the period of limitations in OCGA § 9-3-71(a) "starts on the date that the injury or death occurs. Thus the focus of current law is *on the adverse consequences of the allegedly negligent acts without regard to when the negligent act occurred*, the ensuring course of treatment, or discovery by the patient." (Id., at 7-8; emphasis supplied.) The concurrence expressly pointed out that the Supreme Court was not affirming the trial court's grant of summary judgment "based on a proper analysis under OCGA § 9-3-71(a). Instead, we are remanding the case for 'further proceedings consistent with this opinion.' *Upon remand, the Court of Appeals must, therefore, determine when the statute of limitations began to run on Ms. Williams' misdiagnosis claim and whether she filed her action within two years of that date*. See *Walker v. Melton*, 227 Ga. App. 149, 150(1)(b) (489 SE2d 63) (1997)." Id.; emphasis supplied.

The GTLA is a neutral amicus. Its purpose in filing this brief is not to take a position regarding the outcome of this particular case, but to urge this Court to overturn the erroneous rule that an act of misdiagnosis can itself be the injury that commences the statute of limitation in a medical malpractice action. As Justice Carley has succinctly stated, the focus of OCGA § 9-3-71(a) is on the "adverse *consequences* of the allegedly negligent acts

without regard to when the negligent act occurred." *Young v. Williams*, supra, slip op. at 7-8; emphasis supplied. The rule that the misdiagnosis itself is the injury improperly shifts the focus from the consequences of the physician's negligence on the patient – the injury that will trigger the statute of limitation – to the negligent act itself. The rule directly contravenes the General Assembly's intent in amending the statute of limitation in 1985 from an act-triggered statute to one that commences "on the date on which an injury or death *arising from* a negligent act or omission occurred." 1985 Ga. Laws, p. 556, § 1; emphasis supplied. It ignores the fact that at the moment of misdiagnosis the plaintiff's cause of action has not accrued because there are no damages for which a medical malpractice claim will lie. The rule commences the statute of limitation on the date of the negligent act rather than on the date the injury *arises from* that act, and therefore has the potential to impermissibly cut off the plaintiff's cause of action before it ever accrues.

The GTLA's position that the misdiagnosis itself cannot be the injury that commences OCGA § 9-3-71(a) is consistent with the law in other jurisdictions with injury-triggered medical malpractice statutes of limitation that have addressed this issue. *Paul v. Skemp*, 242 Wis.2d 507, 625 NW2d 860 (2001); *St. George v. Pariser, M.D.*, 253 Va. 319, 484 SE2d 888 (1997); *DeBoer v. Brown*, 138 Ariz. 168, 673 P2d 912 (1983).

Therefore the GTLA respectfully requests that this Court overturn the rule that the misdiagnosis itself is the injury in the majority of misdiagnosis cases, and apply OCGA § 9-3-71(a) to misdiagnosis cases in the manner it is applied to all other medical malpractice cases.

ARGUMENT AND CITATION OF AUTHORITY

I. In medical malpractice cases in which the patient presents for treatment of an existing illness or condition that the physician misdiagnoses, this Court has held that the misdiagnosis itself is the injury that will trigger the statute of limitation. This rule has improperly rewritten OCGA § 9-3-71(a) to commence the statute of limitation on the date of the negligent act, rather than on the date of the injury as the General Assembly intended.

Prior to 1985, OCGA § 9-3-71 required that an action for medical malpractice "be brought within two years after the date on which the negligent or wrongful act or omission occurred." However, the Supreme Court of Georgia held that, as applied, this statute of limitation violated equal protection by creating impermissible classifications barring those wrongful death actions in which death occurred more than two years after the negligent act or omission, *Clark v. Singer*, 250 Ga. 470, 298 SE2d 484 (1983), and barring those claims for personal injury in which the injury occurred more than two years after the negligent act or omission. *Shessel v. Stroup*, 253 Ga. 56, 59, 316 SE2d 155 (1984). The basis for these decisions was that a statute of limitation may not bar a cause of action before it accrues, i.e., before there is ascertainable injury. Id.; *Allrid v. Emory University*, 249 Ga. 35, 36, 285 SE2d 521 (1982).

In 1985 the General Assembly amended OCGA § 9-3-71(a) to remove these constitutional infirmities. Subsection (a) now requires that "an action for medical malpractice shall be brought within two years after the date on

which an injury or death *arising from* a negligent or wrongful act or omission occurred." (Emphasis supplied.) The clear intent of this amendment is to prevent the statute of limitation from expiring before the cause of action accrues. Thus, as a matter of law, the cause of action in a medical malpractice case cannot accrue and the statute of limitation cannot run until there is an injury resulting from the negligent act or omission. *Young v. Williams*, S01G0589 (March 11, 2002). The General Assembly did not define an "injury" that would trigger the statute of limitation. The power and duty to define an "injury" to effect the legislative intent of OCGA § 9-3-71(a) is vested in the appellate courts. The courts have exercised that power, holding that a medical malpractice personal injury claim does not accrue and the statute of limitation does not begin to run until the injury is 'ascertainable' or 'physically manifested,' or until the patient "reasonably should have been aware of such injuries from his symptoms." *Shessel v. Stroup*, supra; *Oxley v. Kilpatrick*, 225 Ga. App. 838, 840, 486 SE2d 44 (1997), rev'd on other grounds, 269 Ga. 82 (1998); *Miller v. Kitchens*, 251 Ga. App. 225, 228, 553 SE2d 300 (2001). This construction of "injury" emphasizes that the focus of OCGA § 9-3-71(a), as amended, "is not on the date of the negligent act, but [on] the *consequence* of the defendant's acts on the plaintiff." *Vitner v. Miller*, 208 Ga. App. 306, 307, 430 SE2d 671 (1993) (emphasis supplied). Notably the rule that the plaintiff's cause of action does not accrue until the injury is physically manifested has two limitations: 1) the plaintiff need not be aware of the causal relationship between the injury and the negligence, *Williams v. Young*, supra, 247 Ga. App. at 339; and 2) five years after the negligent act, the cause of action is barred by the statute of repose even though it may not have accrued. OCGA § 9-3-71(b).

Since the 1985 enactment of § 9-3-71(a), the courts have been called upon to determine when the injury occurred in a variety of medical malpractice cases. Most of these decisions have adhered to the requirement that the injury be physically manifested or otherwise be ascertainable before the cause of action accrues and the statute of limitation begins to run. In cases where the negligent act and resulting injury are concurrent, such as a surgeon's amputation of the wrong limb, there is little difficulty in determining the ascertainable injury that will trigger the statute of limitation. The consequence of the physician's negligence on the patient is immediately known. However, in cases alleging misdiagnosis, a different set of rules has been applied.

> "Lawsuits alleging negligence by misdiagnosis come in two varieties, ones in which the *symptoms of the injury*, usually pain, *exist before the misdiagnosis* and those in which the symptoms manifest themselves to the patient days or even years after the mistaken and allegedly negligent, misdiagnosis. [Cits.] *In most misdiagnosis cases the injury begins immediately upon the misdiagnosis due to the pain, suffering or economic loss sustained by the patient from the time of misdiagnosis until the medical problem is properly diagnosed and treated. The misdiagnosis itself is the injury* and not the subsequent discovery of the proper diagnosis. [Cits.] Nevertheless, 'this is not always the case.' [Cit.] Thus, when a misdiagnosis results in subsequent injury that is difficult or impossible to date precisely, the statute of limitation runs from the date the symptoms attributable to the new injury are manifest to the plaintiff. [Cits.]."

Williams v. Young, 247 Ga. App. 337, 339, 543 SE2d 737 (2000) (emphasis supplied). This rule has been cited by this Court in numerous cases. *Walker v. Melton*, 227 Ga. App. 149 (1997); *Zechman v. Thigpen*, 210 Ga. App. 726 (1993); *Oliver v. Sutton*, 246 Ga. App. 436 (2000); *Charter Peachford Behavioral Health Sys., Inc. v. Kohout*, 233 Ga. App. 452 (1998); *Ford v. Dove*, 218 Ga. App. 828 (1995); *Frankel v. Clark*, 213 Ga. App. 222 (1994); *Stone v. Radiology Servs. P.A.*, 206 Ga. App. 851 (1992); *Surgery Assoc. P.C. v. Keaby*, 199 Ga. App. 716 (1991). It has recently been applied to bar the plaintiff's claim in *Hughley v. Frazier*, A01A2462, A01A2463 (March 27, 2000). There are, however, no cases in which the Georgia Supreme Court has endorsed this rule.

The distinction between the two groups of misdiagnosis cases appears to turn on the idea that where the patient presents for treatment of an existing condition that is misdiagnosed the injury "begins" at the time of misdiagnosis, and therefore "the misdiagnosis itself is the injury." However, in every misdiagnosis case the actionable injury "begins" at misdiagnosis in the sense that the physician's failure to treat or improper treatment based on the misdiagnosis causes the original condition to worsen and eventually produce those physical symptoms which are the "ascertainable injury." But it is the *consequence* of the physician's misdiagnosis – the worsening of the plaintiff's original condition into an actionable injury – rather than the beginning of this injury at misdiagnosis that will give rise to a claim for damages and trigger OCGA § 9-3-71(a).

In latent injury or "subsequent injury" cases this Court has recognized the actionable injury is that which develops over time and reflects the consequence of the

physician's negligence on the patient. The actionable injury is a "new injury," distinct from the latent condition that was misdiagnosed, *Walker v. Melton*, supra, or that the physician failed to diagnose, *Staples v. Bhatti*, 220 Ga. App. 404, 469 SE2d 490 (1996). This Court has correctly held that the statute of limitation begins to run in these "subsequent injury" cases when "the symptoms attributable to the new injury are manifest to the plaintiff." *Williams v. Young*, 247 Ga. App. at 339. "When a misdiagnosis results in subsequent injury that is difficult or impossible to date precisely, the statute of limitation begins to run from the date symptoms attributable to *the new injury* are manifest to the plaintiff." *Walker v. Melton*, 227 Ga. App. 149, 151, 489 SE2d 63 (1997) (spinal injury that developed over time from radiologist's failure to diagnose plaintiff's broken back from x-rays arose when plaintiff felt renewed pain 1 ½ years after misdiagnosis) (emphasis supplied); *Staples v. Bhatti*, 220 Ga. App. 404, 469 SE2d 490 (1996) (metastasis that developed over time from failure to diagnose a cancerous breast tumor did not arise under § 9-3-71(a) until plaintiff experienced pain in her breast four years after misdiagnosis); *Whitaker v. Zirkle*, 188 Ga. App. 706, 373 SE2d 106 (1988) (injury that developed over time from misdiagnosis of cancerous mole did not arise until 8 years following misdiagnosis when bruises appeared at the site of the mole); *Zechman v. Thigpen*, 210 Ga. App. 726, 434 SE2d SE 475 (1993) (injury did not arise from failure to diagnose Coats' disease until child experienced pain in her eye five years after the misdiagnosis; suit filed more than 5 years after the negligent act was within the statute of limitation, but barred by the statute or repose). In each of these cases the plaintiff's "new injury" developed into a far worse injury

as a result of the misdiagnosis and failure to treat, and was the consequence of the physician's negligence.

For example, in *Staples v. Bhatti*, supra, the plaintiff's mammogram indicated a cancerous mass which the physician failed to diagnose. Theoretically her injury "began" at the time of misdiagnosis, because the cancer was left untreated, metastasized and spread to her lymph nodes. Had it been properly diagnosed and treated, her original condition would not have worsened. However, the actionable injury that triggered OCGA § 9-3-71 arose years after the misdiagnosis when the plaintiff experienced pain in her breast. This Court held that the cause of action did not accrue and the statute of limitation did not commence until symptoms of this "new injury" were physically manifested. This Court's reasoning was correct because the plaintiff's "new injury" was the consequence of the defendant's negligence in misdiagnosing and failing to treat the condition. *Vitner v. Miller*, 208 Ga. App. at 307; *Walker v. Melton*, supra.

However, a contrary rule governs misdiagnosis cases such as the one before this Court. Where the patient presents for treatment of an existing condition that the physician misdiagnosis and either fails to treat or erroneously treats, the condition worsens, just as in the "subsequent injury" cases. In the latent injury or "subsequent injury" cases the injury worsens as a result of the failure to provide treatment. In all other misdiagnosis cases the original injury worsens as a result of providing the wrong treatment or no treatment at all. The consequence of the physician's negligence on the patient's original injury in both groups of misdiagnosis cases is the same: the original injury worsens over time. Nonetheless, the rules applied to these cases are different. While in the "subsequent injury"

cases the focus is on the consequence of the physician's negligence on the patient as the General Assembly intended, all other misdiagnosis cases focus solely on the date of the physician's diagnostic error. In the "subsequent injury" cases this Court has held that the statute of limitation does not begin to run until physical symptoms of the "new injury" manifest. But in all other misdiagnosis cases this Court has held that "the symptoms of the injury, usually pain, exist before the misdiagnosis." *Williams v. Young*, 247 Ga. App. at 339. The GTLA respectfully submits that as a matter of law the injury that exists before misdiagnosis cannot become the actionable injury merely by the pronouncement of misdiagnosis because there are no damages at that time and the original injury does not reflect the consequence of the physician's negligence.

However, according to the rule made by this Court, in the majority of misdiagnosis cases the cause of action accrues and the statute of limitation begins to run at the time of the act of misdiagnosis regardless of when the symptoms of the "new injury" that develops as a result of the misdiagnosis physically manifest themselves. 247 Ga. App. at 339. The rule that "the misdiagnosis itself is the injury" ignores the consequence of the physician's negligence on the patient – the aggravation of the original condition as a result of erroneous treatment or no treatment based on the misdiagnosis. It is in contravention of OCGA § 9-3-71(a), which, as the Supreme Court has stated, "begins with the occurrence of an injury, not the performance of a negligent act," and it improperly focuses "on the adverse consequences of the allegedly negligent acts without regard to when the negligent act occurred." *Young v. Williams*, supra, S01G0589, Slip op. at 5; 7-8.

Further, as this Court has recognized, application of this rule has the potential to impermissibly cut off the patient's cause of action before the "new injury" is ascertainable. *Stone v. Radiology Services, PA*, 206 Ga. App. 851, 854, SE2d 663 (1992); *Hughley v. Frazier*, A01A2462, A01A2463 (March 27, 2000) (physical precedent); *Williams v. Young*, 247 Ga. App. at 339. Such a result brings about the very wrong that the 1985 Amendment to § 9-3-71(a) was enacted to prevent.

The GTLA respectfully submits that the rule that the "misdiagnosis itself is the injury" cannot stand for a number of reasons.

1. It is the rare plaintiff who, at the moment of misdiagnosis, has sustained an actionable injury arising from that misdiagnosis. In the vast majority of cases in which the plaintiff presents for treatment with an existing illness or condition, the physician's act or omission in failing to properly diagnose that condition does not immediately give rise to a claim for damages capable of enforcement. At most, the act of misdiagnosis gives rise to a threat of future harm which is not actionable.

2. By focusing on the act of misdiagnosis rather than on an ascertainable "new injury" that develops over time and is the consequence of the physician's negligence, this rule results in the accrual of the cause of action and the commencement of the statute of limitation *at the latest* on the date of the misdiagnosis – the negligent act or omission – rather than on the date of the injury arising from the negligent act. (For applications of this rule to facts, see, *Williams v. Young*, 247 Ga. App. 337, 340, 543 SE2d 737 (2000); *Hughley v. Frazier*, A01A2462, A01A2463 (Decided March 27, 2002) (physical precedent).) The rule

thus contravenes the General Assembly's intent in amending OCGA § 9-3-71(a) to commence the statute of limitation on the date of the injury rather than on the date of the negligent act. It potentially allows the statute of limitation to expire before the cause of action accrues.

3. The rule impermissibly treats misdiagnosis cases in which the plaintiff presents with an existing illness or condition differently not only from all other misdiagnosis cases, but differently from all other medical malpractice cases. In medical malpractice cases alleging an overt act of negligence rather than misdiagnosis, the statute of limitation runs from the physically manifested or ascertainable injury arising from that act.[1] See, *Vitner v. Miller*, 208 Ga. App. 306, 430 SE2d 671 (1993) (plaintiff's injury from negligently performed abortion did not arise until days later when "the injury manifested itself . . . [and the plaintiff] began to bleed and experience pain."); *Shessel v. Stroup*, 253 Ga. 56, 59, 316 SE2d 155 (1984) (negligently performed tubal ligation did not become actionable until

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[1] The exceptions are 1) cases alleging fraudulent concealment where, because the physician induces the plaintiff to refrain from seeking other medical care or from making further inquiries into his condition, the statute of limitation runs only from the time of the plaintiff's discovery of the existence of the negligence. *Oxley v. Kilpatrick*, 225 Ga. App. 838 (1997), rev'd on other grounds in *Rossi v. Oxley*, 269 Ga. 82 (1998); *Bynum v. Gregory*, 215 Ga. App. 4[illegible]1, 450 SE2d 840 (1994); see also, OCGA § 9-3-96; and 2) where a foreign object is left in a patients' body. In this situation the statute of limitation of § 9-3-71 does not apply, but instead OCGA § 9-3-72 provides that the "action shall be brought within one year after the date the negligent or wrongful act or omission is discovered."

* * *

negligence – the misdiagnosis – without mention of the plaintiff's injury or when it occurred.

injury manifested itself two years later in the form of pregnancy). The results in these cases were reached because the focus of § 9-3-71(a) "is not on the date of the negligent act, but [on] the consequence of the defendant's acts on the plaintiff." *Vitner v. Miller*, 208 Ga. App. at 307. However, in cases where the physician misdiagnoses an existing condition

[the page numbered 15 in the Amicus brief is not available]

misdiagnosis itself is the injury.

The disparate treatment afforded these classifications of misdiagnosis cases is inequitable and impermissible. The "subsequent injury" misdiagnosis cases are treated the same as all other medical malpractice cases – the statute begins to run two years from the date of an ascertainable injury that is the consequence of the physician's negligence. But a plaintiff who submits for treatment of a condition that is misdiagnosed has but two years from the date of the act of misdiagnosis in which to file suit, regardless of whether there is an ascertainable injury for which damages will lie. See, *Hughley v. Frazier*, A01A2462, A01A2463 (March 27, 2002) (physical precedent). Thus, the plaintiff in who seeks treatment of an existing condition that is misdiagnosed is unfairly penalized. While the record in this case does not indicate a constitutional challenge to these separate classifications was made, it is clear that this distinction between misdiagnosis cases is not rationally related to any valid legislative purpose because the General Assembly intended that in all medical malpractice cases the statute of limitation commence at the time of injury rather than the negligent act. OCGA § 9-3-71(a); *Young v. Williams*, S01G0589 (March 11, 2002). Further, this Court adopted the continuous treatment doctrine in *Williams v. Young*, supra, 247 Ga. App. 337, to

ameliorate the harshness of this very rule. Abolishing this rule will result in misdiagnosis cases being treated the same as all other medical malpractice cases.

II. The Supreme Courts of other states with injury-triggered medical malpractice statutes of limitation have held that a misdiagnosis cannot be the injury that gives rise to a claim for damages and will commence running of the statute.

Other states with injury-triggered medical malpractice statutes of limitation have uniformly rejected the argument that the act or omission of misdiagnosis can be the injury that triggers the statute. They have instead held that the plaintiff's claim cannot accrue and the statute cannot begin to run until the plaintiff sustains an injury as a *result* of the misdiagnosis.

Paul v. Skemp, 242 Wis. 2d 507, 625 NW2d 860 (2001) best illustrates the GTLA's position. Nineteen-year old Jennifer Paul first sought treatment for headaches from the defendant physician's clinic when she was nine. For ten years she was diagnosed and treated by the defendant's clinic for a sinus condition, but her headaches persisted. In November and December, 1994, Jennifer sought treatment from the defendant for headaches which were, once again, diagnosed and treated as sinus related. On May 22, 1995 Jennifer was taken to a hospital emergency room where it was determined that an arteriovenous malformation (AVM) in her right cerebellum had ruptured. She died the following day. Her parents filed suit against the defendant, alleging that he had misdiagnosed Jennifer's headaches and had failed to diagnose the AVM.

Wisconsin's medical malpractice statute of limitation requires an action to be filed within the later of 1) three years from the date of the injury or 2) one year from the date of discovery. Wis. Stat. § 893.55(1). Dr. Skemp, the defendant, moved for summary judgment on the basis of the 3 year period of limitation,[3] maintaining that the last alleged misdiagnosis on December 20, 1994 was Jennifer's injury, and because suit was not filed within 3 years of that date, it was barred. Jennifer's parents responded with the affidavit of a physician who averred that the ruptured blood vessel resulting from the AVM was the injury resulting from the misdiagnosis, and that had it been diagnosed at any time prior to May 1, 1995 – approximately three weeks prior to rupture – Jennifer would not have sustained this injury.

The Wisconsin Supreme Court rejected Dr. Skemp's argument that the misdiagnosis was the injury on a number of grounds. It first pointed out that if the negligent omission – the failure to properly diagnose and treat – was deemed Jennifer's injury, then the injury-triggered medical malpractice statute of limitation "would be changed into a negligence-based rule of accrual." 625 NW2d at 865. The Court recognized that the Wisconsin legislature did not intend for a medical malpractice action to accrue at the time of the negligent act or omission, but only at the time of an injury arising from an act or omission by a health care provider. Id., at 866. The Court noted that the Wisconsin statute of limitation recognizes that a

[3] Wisconsin's limitation period based on discovery was not at issue in this case.

tort claim is not capable of enforcement until there is both an act or omission and an injury *resulting* from that act or omission. The Court held that where the patient presents with a condition for medical treatment, the injury on which the cause of action is based "is not the original detrimental condition; it is the injury which later occurs because of the misdiagnosis and failure to treat." 625 NW2d at 872.

> "Here we have a case wherein the alleged negligence and the resulting injury did not occur concurrently. The alleged negligence – the failure to correctly diagnose the source of Jennifer's headaches, preceded the resulting injury – the rupture of the AVM and subsequent hemorrhaging. [Dr.] Skemp effectively contends that the negligence and injury occurred simultaneously, as evidenced by Jennifer's continued headaches. However, Jennifer's headaches were the condition that existed both before and after Skemp examined and diagnosed her. Consequently, Skemp's failure to properly diagnose the headaches could not have caused those headaches."

625 NW2d at 866.

The Wisconsin Supreme Court concluded that an injury-triggered statute of limitation requires that "the negligence and its result – an injury – should be considered separately. The negligence must cause an injury before there is an accrual of a claim." Id., at 870. To hold otherwise would lead to an incongruous and inequitable end.

> "[I]f a misdiagnosis was an injury that would start the limitations period running, patients would have to obtain a second or third opinion or risk losing a claim for medical malpractice. The result would be to drive up health care costs . . .

> Until there is any injury, any damages sought would be speculative."

625 NW2d at 872.

The Supreme Courts of Virginia and Arizona, states with injury-triggered medical malpractice statutes, have reached the same conclusion. "In every misdiagnosis case, the patient has some type of medical problem at the time the physician is consulted. But the injury upon which the cause of action is based is not the original detrimental condition; it is the injury which later occurs because of the misdiagnosis and failure to treat." *St. George v. Pariser, M.D.*, 253 Va. 319, 484 SE2d 888, 891 (1997). This is so because the physician's negligent act or omission could not have been the cause of the presenting illness. In *St. George*, the physician failed to diagnose a cancerous mole which metastasized and was no longer completely curable. The plaintiff's injury did not occur when the physician failed to diagnose the cancer, but when the cancer metastasized and invaded other parts of her body. The injury that was the consequence of the physician's negligence was the requirement of more extensive treatment and post-surgical monitoring.

Likewise in *DeBoer v. Brown*, 138 Ariz. 168, 673 P2d 912, 914 (1983), the Supreme Court of Arizona rejected the argument that a misdiagnosis could be the injury that triggers the statute of limitation. "Where a medical malpractice claim is based on a misdiagnosis or a failure to diagnose a condition, the 'injury' is not the mere undetected existence of the medical problem at the time the physician misdiagnosed or failed to diagnose it. Nor is the 'injury' the mere continuance of the same problem in substantially the same state or the leaving of the patient

'at risk' of developing a more serious condition. Rather, the 'injury' is the development of the problem into a more serious condition which poses greater danger to the patient or which requires more extensive treatment." The Arizona Supreme Court's analysis correctly recognized that the actionable injury is not the original injury or condition for which the patient sought treatment, but the "new injury" that develops as a result of the misdiagnosis and improper treatment or failure to treat.

This authority supports the GTLA's position that a misdiagnosis is an act that deprives the plaintiff of the opportunity to have the injury or condition properly treated before it develops into a condition that requires more extensive treatment or becomes untreatable. The act itself is not an ascertainable, actionable injury. Nor can the condition for which the patient sought diagnosis and treatment be the actionable injury. When the words of misdiagnosis are uttered, there are generally no injurious consequences to the plaintiff that could either give rise to an action for damages or trigger the statute of limitation. While it is true that the plaintiff's original condition, if misdiagnosed and wrongly treated, **may** place the plaintiff at risk of developing a more serious condition, at the moment of misdiagnosis, this is merely the threat of a future harm which is not actionable. The only injury that will commence OCGA § 9-3-71(a) in a misdiagnosis case is the "new injury" that arises as a result of the negligent failure to diagnose and treat; only this injury reflects the consequence of the defendant's negligence on the plaintiff. Nonetheless this law has not been uniformly applied in misdiagnosis cases.

III. The rule that the "misdiagnosis is itself the injury" is inconsistent with Georgia's public and legal policies.

Georgia law recognizes and the patient is charged with knowledge that a physician may not always bring about a cure, and the failure of a prescribed medical treatment to produce favorable results does not give rise to a presumption of negligence. *Bray v. Dixon*, 176 Ga. App. 895, 897, 338 SE2d 872 (1985); *Blount v. Moore*, 159 Ga. App. 80, 81, 282 SE2d 720 (1981). Further, under Georgia law neither the courts nor a layperson are deemed competent to determine the parameters of acceptable medical care. Only medical experts are qualified to do so. *Ketchup v. Howard*, 247 Ga. App. 54, 61 (2000).[4]

Instead, every patient who is being treated by a physician has a right to rely on "[t]he presumption of law in this state . . . that a physician exercises his skills in the medical and surgical field in an ordinary skillful manner (reasonable degree of skill) until a want of such care and skill has been shown." *Stephen W. Brown Radiology Associates v. Gowers*, 157 Ga. 770, 773, 278 SE2d 653 (1981). A defendant physician in a medical malpractice

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[4] For example, whether a physician has breached the duty of care owed the patient cannot be legally opined by the patient or any other layperson; only another medical expert can determine whether the standard of care has been breached. *Ketchup v. Howard*, supra, 247 Ga. App. at 59. Accordingly, at the time a plaintiff files a medical malpractice action, he must file with it the affidavit of an expert competent to testify at trial as to at least one deviation from the standard of care. OCGA § 9-11-9.1. At trial, the plaintiff must produce expert medical testimony to establish the standard of care and that it has been breached. *Minnix v. DOT*, 272 Ga. 566, 572, 533 SE2d 75 (2000).

case is entitled to have this presumption charged to the jury,[5] but it is no less applicable when the health and rights of a patient are at issue. Thus until a want of care is demonstrated, the patient has no reason to question the physician's diagnosis of his condition or method of treatment. Because of this presumption and the confidential nature of the relationship between physician and patient, "a patient has the right to believe what he is told by his medical doctors about his condition." *Hill v. Fordham*, 186 Ga. App. 354, 367 SE2d 128 (1988). A patient has "no duty to investigate or confirm the truth or accuracy" of the physicians' representations. *Oxley v. Kilpatrick*, supra, 225 Ga. App. at 840-841.[6] Indeed, were the law to impose a duty on a patient to seek confirmation of or challenge a physician's diagnosis or recommended course of treatment, the confidential relationship would be destroyed and managed care would be in chaos.

On the one hand the law and public policy of this State encourage a patient to rely on the diagnosis and course of treatment prescribed by his physician. They tells [sic] him that he has no duty to question either the diagnosis or treatment or to seek a second opinion. On the other hand, the rule that a misdiagnosis itself is the injury places on a

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[5] The pattern charge is "[t]he presumption in such cases is that the services were performed in an ordinary skillful manner, and the burden is on one claiming injury to show a lack of due care and skill", citing *Washington v. City of Columbus*, 136 Ga. App. 682 (1975). Suggested Pattern Jury Instructions, Civil Cases, Vol I, Section XXXII, Torts, CC, Skill Required of Physician.

[6] The GTLA acknowledges that these rules are most often cited in cases involving fraudulent concealment. However, they apply equally to every patient under the care of a physician.

patient a burden of investigating the accuracy of each medical diagnosis, because if it is wrong, the statute of limitation on the patient's claim begins to run immediately and the cause of action may be extinguished before it ever accrues. As the Wisconsin Supreme Court succinctly stated, "if a misdiagnosis was an injury that would start the limitations period running, patients would have to obtain a second or third opinion or risk losing a claim for medial malpractice. The result would be to drive up health care costs." 625 NW2d at 872.

However, in the era of HMO's [sic] and managed care it is no longer possible for a patient to obtain a second medical opinion at will. In most cases even if the patient is dissatisfied or wishes to challenge treatment, he lacks independence to effect a change. Thus the rule that the misdiagnosis itself is the injury places a patient in an untenable position. As this Court recognized in *Williams v. Young*, supra, 247 Ga. App. 337, applying this rule is particularly harsh in cases where the patient submits to continuous treatment based on the misdiagnosis and because of reliance on the physician's skill does not question the diagnosis or course of treatment.

The rule that the misdiagnosis itself is the injury also improperly removes a physician's burden of proof where the OCGA § 9-3-71(a) is raised as a defense. Where the affirmative defense of OCGA § 9-3-71(a) is asserted, the physician bears the burden of showing that suit was not filed within two years of the injury that arises from the negligent act or omission. *Walker v. Melton*, 227 Ga. App. 149, 151, 489 SE2d 63 (1997); OCGA § 9-11-8(c). This defense is often asserted in a motion for summary judgment where the physician bears the burden of establishing when the injury occurred and that suit was not filed within

2 years of that date. In cases such as the one before this court, and in *Hughley v. Frazier*, A01A2462, A01A2463 (March 27, 2002), where the plaintiff has an existing illness that is misdiagnosed and is either wrongly treated or goes untreated, the rule that the misdiagnosis is itself the injury improperly satisfies the physician's burden without any proof of when the ascertainable injury that is the consequence of the physician's negligence occurred. The physician is improperly allowed to rely on the date of misdiagnosis to trigger the statute of limitation.

Examining the rule from a different angle, the Wisconsin Supreme Court correctly recognized that if the act of misdiagnosis will trigger the statute of limitations, a physician who moves for summary judgment bears the burden of establishing a causal nexus between the act of misdiagnosis and the condition with which the patient presented for diagnosis, almost always a legal and factual impossibility. *Paul v. Skemp*, supra, 625 NW2d at 872.

CONCLUSION

The rule that the misdiagnosis itself is the injury contravenes the General Assembly's intent in enacting OCGA § 9-3-71(a). Further, it improperly distinguishes between misdiagnosis cases, shortening the period of limitation in the majority of them and creating the real possibility that a patient's cause of action may expire before there is ascertainable injury.

There are no laudable reasons for perpetuating this rule. It certainly does not lower medical costs. On the contrary, to the extent that it encourages or requires patients to seek a second diagnosis to protect their rights, it inflates medical expenses.

The GTLA respectfully submits that the rule should be abolished and that OCGA § 9-3-71 (a) should be applied uniformly to all medical malpractice cases, including misdiagnosis cases in which the plaintiff seeks a diagnosis of an existing condition or illness.

Respectfully submitted, this 25th day of April, 2002.

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a true and correct copy of the **AMICUS CURIAE BRIEF ON BEHALF OF THE GEORGIA TRIAL LAWYERS ASSOCIATION FILED IN RESPONSE TO THE ISSUE POSED ON REMAND BY THE SUPREME COURT OF GEORGIA** on Counsel listed below by depositing it in the United States Mail, properly addressed, and with sufficient postage affixed thereon to ensure delivery:

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